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IN THE

SUPREME COURT OF THE UNITED STATES

JULY TERM, 1979

NO. A-992

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****

WILLIAM JACK HAMMETT,
PETITIONER,
V.
THE STATE OF TEXAS,
RESPONDENT.

****

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TEXAS

****

PETITIONER PRAYS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE JUDGMENT OF THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS, ENTERED FEBRUARY 28, 1979, REHEARING DENIED MARCH 10, 1979.

CITATIONS TO OPINIONS BELOW

THE OPINION OF THE TEXAS COURT OF CRIMINAL APPEALS IS REPORTED AT SW2D (1979) AND ATTACHED AS APPENDIX A.

JURISDICTION

JURISDICTION OF THIS COURT IS INVOKED UNDER 28 U.S.C. SEC. 1257(3), PETITIONER HAVING ASSERTED BELOW AND ASSERTING HERE DEPRIVATION OF RIGHTS SECURED BY THE CONSTITUTION OF THE UNITED STATES.

QUESTION PRESENTED

WHETHER THE RULE OF JUREK V. TEXAS, 23 CR.L. 3215 (1978), WAS VIOLATED BY THE FAILURE TO ALLOW THE DEFENDANT TO SEEK A PSYCHOLOGIST TO TESTIFY AS TO THE THIRD ISSUE UNDER THE DEATH PENALTY STATUTE SO THAT A JUROR WOULD BE ABLE TO SEE WHATEVER MITIGATING CIRCUMSTANCES THE DEFENDANT MIGHT BE ABLE TO ALLOW.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. THIS CASE INVOLVES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

2. THIS CASE ALSO INVOLVES THE FOLLOWING PROVISIONS OF TEXAS LAW:

TEXAS PENAL CODE, SEC. 19.03. CAPITAL MURDER.

(A) A PERSON COMMITS AN OFFENSE IF HE COMMITS MURDER AS DEFINED UNDER SECTION 19.02(A)(1) OF THIS CODE, AND:

(1) THE PERSON MURDERS A PEACE OFFICER OR FIREMAN WHO IS ACTING IN THE LAWFUL DISCHARGE OF AN OFFICIAL DUTY AND WHO THE PERSON KNOWS IS A PEACE OFFICER OR FIREMAN;

(2) THE PERSON INTENTIONALLY COMMITS THE MURDER IN THE COURSE OF COMMITTING OR ATTEMPTING TO COMMIT KIDNAPPING, BURGLARY, ROBBERY, AGGRAVATED RAPE, OR ARSON;

(3) THE PERSON COMMITS THE MURDER FOR REMUNERATION OR EMPLOYS ANOTHER TO COMMIT THE MURDER FOR REMUNERATION OR THE PROMISE OF REMUNERATION;

(4) THE PERSON COMMITS THE MURDER WHILE ESCAPING OR ATTEMPTING TO ESCAPE FROM A PENAL INSTITUTION; OR

(5) THE PERSON, WHILE INCARCERATED IN A PENAL INSTITUTION, MURDERS ANOTHER WHO IS EMPLOYED IN THE OPERATION OF THE PENAL INSTITUTION;

(B) AN OFFENSE UNDER THIS SECTION IS A CAPITAL FELONY.

(C) IF THE JURY DOES NOT FIND BEYOND A REASONABLE DOUBT THAT THE DEFENDANT IS GUILTY OF AN OFFENSE UNDER THIS SECTION, HE MAY BE CONVICTED OF MURDER OR OF ANY OTHER LESSER INCLUDED OFFENSE.

TEXAS CODE OF CRIMINAL PROCEDURE ARTICLE 37.01. PROCEDURE IN CAPITAL CASE.

(A) UPON A FINDING THAT THE DEFENDANT IS GUILTY OF A CAPITAL OFFENSE, THE COURT SHALL CONDUCT A SEPARATE SENTENCING PROCEEDING TO DETERMINE WHETHER THE DEFENDANT SHALL BE SENTENCED TO DEATH OR LIFE IMPRISONMENT. THE PROCEEDING SHALL BE CONDUCTED IN THE TRIAL COURT BEFORE THE TRIAL JURY AS SOON AS PRACTICABLE. IN THE PROCEEDING, EVIDENCE MAY BE PRESENTED AS TO ANY MATTER THAT THE COURT DEEMS RELEVANT TO SENTENCE. THIS SUBSECTION SHALL NOT BE CONSTRUED TO AUTHORIZE THE INTRODUCTION OF ANY EVIDENCE SECURED IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES OR OF THE STATE OF TEXAS. THE STATE AND THE DEFENDANT OR HIS COUNSEL SHALL BE PERMITTED TO PRESENT ARGUMENT FOR OR AGAINST SENTENCE OF DEATH.

(B) ON CONCLUSION OF THE PRESENTATION OF THE EVIDENCE, THE COURT SHALL SUBMIT THE FOLLOWING ISSUES TO THE JURY:

(1) WHETHER THE CONDUCT OF THE DEFENDANT THAT CAUSED THE DEATH OF THE DECEASED WAS COMMITTED DELIBERATELY AND WITH THE REASONABLE EXPECTATION THAT THE DEATH OF THE DECEASED OR ANOTHER WOULD RESULT;

(2) WHETHER THERE IS A PROBABILITY THAT THE DEFENDANT WOULD COMMIT CRIMINAL ACTS OF VIOLENCE THAT WOULD CONSTITUTE A CONTINUING THREAT TO SOCIETY; AND

(3) IF RAISED BY THE EVIDENCE, WHETHER THE CONDUCT OF THE DEFENDANT IN KILLING THE DECEASED WAS UNREASONABLE IN RESPONSE TO THE PROVACATION, IF ANY, BY THE DECEASED.

(C) THE STATE MUST PROVE EACH ISSUE SUBMITTED BEYOND A REASONABLE DOUBT, AND THE JURY SHALL RETURN A SPECIAL VERDICT OF "YES" OR "NO" ON EACH ISSUE SUBMITTED.

(D) THE COURT SHALL CHARGE THE JURY THAT:

(1) IT MAY NOT ANSWER ANY ISSUE "YES" UNLESS IT AGREES UNANIMOUSLY; AND

(2) IT MAY NOT ANSWER ANY ISSUE "NO" UNLESS 10 OR MORE JURORS AGREE.

(E) IF THE JURY RETURNS AN AFFIRMATIVE FINDING ON EACH ISSUE SUBMITTED UNDER THIS ARTICLE, THE COURT SHALL SENTENCE THE DEFENDANT TO DEATH. IF THE JURY RETURNS A NEGATIVE FINDING ON ANY ISSUE SUBMITTED UNDER THIS ARTICLE, THE COURT SHALL SENTENCE THE DEFENDANT TO CONFINEMENT IN THE TEXAS DEPARTMENT OF CORRECTIONS FOR LIFE.

(F) THE JUDGMENT OF CONVICTION AND SENTENCE OF DEATH SHALL BE SUBJECT TO AUTOMATIC REVIEW BY THE COURT OF CRIMINAL APPEALS WITHIN 60 DAYS AFTER CERTIFICATION BY THE SENTENCING COURT OF THE ENTIRE RECORD UNLESS TIME IS EXTENDED AN ADDITIONAL PERIOD NOT EXCEEDING 30 DAYS BY THE COURT OF CRIMINAL APPEALS FOR GOOD CAUSE SHOWN. SUCH REVIEW BY THE COURT OF CRIMINAL APPEALS SHALL HAVE PRIORITY OVER ALL OTHER CASES, AND SHALL BE HEARD IN ACCORDANCE WITH RULES PROMULGATED BY THE COURT OF CRIMINAL APPEALS.

TEXAS CONSTITUTION ARTICLE 3, SEC. 31. ORIGINATION IN EITHER HOUSE; AMENDMENT.

BILLS MAY ORIGINATE IN EITHER HOUSE, AND, WHEN PASSED BY SUCH HOUSE, MAY BE AMENDED, ALTERED OR REJECTED BY THE OTHER.

TEXAS CONSTITUTION ARTICLE 3, SEC. 35. SUBJECTS AND TITLES OF BILLS.

NO BILL, (EXCEPT GENERAL APPROPRIATION BILLS, WHICH MAY EMBRACE THE VARIOUS SUBJECT AND ACCOUNTS, FOR AND ON ACCOUNT OF WHICH MONEYS ARE APPROPRIATED) SHALL CONTAIN MORE THAN SUBJECT, WHICH SHALL BE EXPRESSED IN ITS TITLE. BUT IF ANY SUBJECT SHALL BE EMBRACED IN AN ACT, WHICH SHALL NOT BE EXPRESSED IN THE TITLE, SUCH ACT SHALL BE VOID ONLY AS TO SO MUCH THEREOF, AS SHALL NOT BE SO EXPRESSED.

STATEMENT

THE COURT ERRED IN PERMITTING THE PSYCHIATRIST, DR. HENRY, TO TESTIFY IN THE PUNISHMENT STAGE OF THE TRIAL CONCERNING THE "PROBABILITY" THAT THE DEFENDANT WOULD COMMIT FURTHER CRIMES OF VIOLENCE, THE SAME BEING BEYOND THE ORDER OF THE COURT TO DETERMINE EVENTUAL COMPETENCY TO STAND TRIAL AND IN REFUSING TO APPOINT A PSYCHOLOGIST OF THE DEFENDANT'S CHOICE TO TESTIFY AS TO THE PROBABILITY THAT HE WOULD COMMIT FUTURE CRIMINAL ACTS OF VIOLENCE AND IN REFUSING TO REQUIRE THE STATE TO INTRODUCE THE COURT'S ORDER FOR AN EXAMINATION OF THE DEFENDANT AS TO "MENTAL COMPETENCE TO STAND TRIAL."

THE ORDER OF THE COURT FOR THE APPOINTMENT OF A PSYCHIATRIST TO EXAMINE THE DEFENDANT WAS ENTERED ON THE 20TH DAY OF APRIL, A.D., 1977. (TRANSCRIPT, P. 1505)

THE ORDER RECITES ". . .IT COMING TO THE ATTENTION OF THE COURT THAT THE ISSUES OF 'INCOMPETENCY TO STAND TRIAL'

MAY BE RAISED, . . ." "WITH REGARD TO HIS COMPETENCY TO STAND TRIAL,. . ."

THE COURT ORDER WAS INTRODUCED ON CROSS-EXAMINATION OF THE WITNESS. (S.F. P 1271, L 6-15) THE ORDER WAS READ TO THE JURY. (S.F. P 1271, L 23-P 1272, L 15)

THE TESTIMONY OF THE WITNESS, DR. HENRY, FROM THE ORDER SAID, "IT ORDERS AN EVALUATION WITH REGARDS TO 'COMPETENCY TO STAND TRIAL'." (S.F. P 1272, L 19-23)

AT NO POINT IN TIME DURING THE EXAMINATION OF THE WITNESS, DR. HENRY, DID THE STATE, THROUGH THE STATE'S ATTORNEY, EVER ASK THE QUESTION "IS THE DEFENDANT, WILLIAM JACK HAMMETT, MENTALLY COMPETENT TO STAND TRIAL?" (S.F. P 1239, L 9-P 1262, L 17) TO THE CONTRARY, THE STATE ATTEMPTED ONLY TO SECURE AN ANSWER FROM THE WITNESS, DR. HENRY, TO THE ISSUE TO BE SUBMITTED TO THE JURY, TO-WIT: "WHETHER THERE IS A PROBABILITY THAT THE DEFENDANT WOULD COMMIT CRIMINAL ACTS OF VIOLENCE THAT WOULD CONSTITUTE A CONTINUING THREAT TO SOCIETY." (S.F. P 1256, L 4-P 1259, L 5)

THE QUESTION OF COMPETENCY OR SANITY HAD NEVER BEEN RAISED, NO JUROR WAS QUESTIONED ON THE ISSUE OF COMPETENCY TO STAND TRIAL OR ON THE ISSUE OF MENTAL SANITY, NO EVIDENCE AT THE GUILT OR PUNISHMENT STAGE WAS RAISED OR INTRODUCED BY THE DEFENSE AS TO THE DEFENDANT'S COMPETENCY TO STAND TRIAL OR AS TO THE DEFENDANT'S SANITY OR ANY OTHER POTENTIAL PERSONALITY DISORDERS.

IT IS THE OPINION OF THIS WRITER THAT "THE CIRCUMSTANCES SURROUNDING THE STATE'S PRESENTATION OF DR. HENRY'S

TESTIMONY AT THE PUNISHMENT STAGE OF THE TRIAL WAS GROSSLY UNFAIR AND THE DEFENDANT WAS THUS DENIED DUE PROCESS OF LAW" I.E. ERNEST BENJAMIN SMITH VS W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL, NO. CA3-77-0544-F, IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION, OPINION OF _____, JUDGE. THE REASONS ARE:

(1) THE DOCTOR'S TESTIMONY EXCEEDED THE AUTHORITY GRANTED UNDER THE COURT'S ORDER. (T P 1505) SUCH TESTIMONY BEING ALLOWED VIOLATES AMENDMENT IV AND XIV OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

(2) THE DEFENDANT WAS DENIED THE RIGHT TO SECURE EXPERT OPINION TESTIMONY ON SUCH ISSUE BY THE COURT'S REFUSAL TO GRANT THE DEFENDANT'S MOTION FOR A PSYCHOLOGIST. (T P 1632-1634) SUCH ACTION IS IN VIOLATION OF AMENDMENT VI AND XIV OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

(3) IN NOT REQUIRING THE STATE TO INTRODUCE THE COURT'S ORDER FOR AN EXAMINATION AS TO THE DEFENDANT'S MENTAL COMPETENCY TO STAND TRIAL, AND PERMITTING THE WITNESS AND THE STATE TO IMPLY TO THE JURY THAT THE EXAMINATION WAS TO ALL POINTS, AND NOT ONLY TO THIS POINT OF "MENTAL COMPETNECY TO STAND TRIAL." SUCH ACTION IS IN VIOLATION OF AMENDMENT V AND XIV OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

(4) IN PERMITTING THE WITNESS, DR. HENRY, TO FORM OPINIONS BASED UPON HIS EXAMINATION OF THE DEFENDANT'S JUVENILE CRIMINAL RECORD AND UPON UNPROVEN ALLEGATIONS OF CRIMES IN HARRIS COUNTY, TEXAS, AS SHOWN IN THE STATE'S EXHIBIT 17. (S.F. P 1234, L 12-P 1236, L 23) (S.F. P 1427-1431) (S.F.

P 1489-1494) SUCH ACTION IS IN VIOLATION OF AMENDMENT IV, V, VI AND XIV OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

THAT THE DEFENDANT WAS EFFECTIVELY DENIED THE RIGHT TO PRESENT COMPLETE TESTIMONY REGARDING MITIGATING FACTORS ON HIS ALLEGED PERSONALITY DISORDER WHICH SUPPOSEDLY ENABLES HIM A CONTINUING THREAT TO SOCIETY BECAUSE EH WAS DENIED THE RIGHT FOR A PSYCHOLOGIST FOR TESTIMONY TO CONTRADICT OR EXPLAIN THE DIFFERENCES BETWEEN THE TESTIMONY OF ANOTHER EXPERT AND THE WITNESS, DR. HENRY. SUCH ACTION IS IN VIOLATION OF AMENDMENT V AND XIV OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

THAT THE DEFENDANT WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE OF THE METHODS OF THE EMPLOYMENT OF THE STATE WITH REGARD TO THE TESTIMONY OF DR. HENRY IN THAT THE DEFENDANT WAS NOT ALLOWED AN OPPORTUNITY TO SUCH EXPERT OPINION TESTIMONY IN REBUTTAL TO THE TESTIMONY OF DR. HENRY. (T P 1632-1634) SUCH ACTION IS IN VIOLATION OF AMENDMENT IV, V, VI AND XIV OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

THAT FAILURE TO PROVIDE EXPERT PSYCHIATRIC ASSISTANCE MAY DEPRIVE AN INDIGENT DEFENDANT OF EFFECTIVE ASSISTANCE OF COUNSEL. GREER VS BETO (379 F2D 923, 924, 5TH CIR. 1967); HINTZ VS BETO (379 F2D, 937, 5TH CIR. 1967) CONTRARY TO THE PROVISIONS OF AMENDMENT VIII OF THE UNITED STATES OF AMERICA.

THAT THE DEFENDANT WAS NOT ADVISED OF HIS RIGHT TO REMAIN SILENT AT THE PSYCHIATRIC EXAMINATION ON ANY QUESTION OTHER THAN "HIS COMPETENCY TO STAND TRIAL" WHERE HE DID NOT SEEK TO INTRODUCE PSYCHIATRIC TESTIMONY ON THE ISSUE HIMSELF AT THE GUILT/INNOCENCE STAGE OF THE TRIAL, OR ON THE PUNISHMENT

STAGE OF THE TRIAL AND WHERE HE WAS DENIED THE RIGHT TO SUCH EXPERT OPINION THROUGH AN EXAMINATION AS TO THE ISSUE OF THE "PROBABILITY THAT THE DEFENDANT WOULD COMMIT CRIMINAL ACTS OF VIOLENCE THAT WOULD CONSTITUTE A CONTINUING THREAT TO SOCIETY" AFTER A REQUEST THEREUPON HAD BEEN DULY MADE BEFORE THE TRIAL OF THE CASE UPON THE FACTS. SUCH ACTION IS IN VIOLATION OF AMENDMENT IV, V, VI AND XIV OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

IT WAS OBVIOUS TO THIS WRITER THAT THE STATE WOULD ATTEMPT TO USE DR. HENRY AS TO THIS ISSUE DURING PUNISHMENT CONTRARY TO THE ORDER OF THE COURT AND WITHOUT THE DEFENDANT HAVING AN OPPORTUNITY TO SEEK EXPERT ADVICE AND OPINION AND THAT IS WHY THE REQUEST (T P 1632-1634) WAS DULY AND TIMELY FILED. IF THE REQUEST HAD BEEN GRANTED BY THE COURT, THE DEFENDANT COULD HAVE BEEN AVAILABLE FOR INTERVIEW FOR AT LEAST FOUR (4) HOURS PER DAY FOR A PERIOD OF AT LEAST FOUR (4) DAYS, WHICH IS MORE TIME THAN THE WITNESS, DR. HENRY, HAD WITH THE DEFENDANT FOR HIS INTERVIEW. SEE SLAYTON VS STATE (CR. APP. 1967) 418 SW2D 508. SUCH ACTION IS IN VIOLATION OF AMENDMENT IV, V, VI AND XIV OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

THIS CASE WAS TRIED TWICE. THE FIRST TRIAL ENDED IN A MISTRIAL.

ON FEBRUARY 16, 1977, AN INDICTMENT WAS RETURNED WHICH CHARGED APPELLANT WITH THE OCTOBER 14, 1976 CAPITAL MURDER OF RAYMOND V. GREER WHILE IN THE COURSE OF COMMITTING A ROBBERY (R:P 1499).

ON FEBRUARY 23, 1977, APPELLANT PERSONALLY APPEARED BEFORE THE COURT, WAS DULY ARRAIGNED AND ENTERED A PLEA OF

"Not Guilty." Appellant appeared with, had employed, and was then represented in the First Trial of this cause by attorney, Robert "Bob" Tarrant, of Houston, Texas (R:P 1654).

On March 15, 1977, the Court heard evidence and argument on and subsequently ruled on certain of Appellant's pre-trial motions. (Many, but not all of said Motions were filed by Appellant before and during the second trial of this cause. Several of those motions which were filed at this first trial of this cause are contained in the "Supplemental Transcript" at pages 1-20).

On April 20, 1977, the Court entered its "Order" for the psychiatric examination of the Appellant pursuant to Article 46.02, V.A.C.C.P., and upon Defendant's Motion. (Supplemental Transcript: p. 23) (A copy of said Motion is attached as Exhibit "A".)

On April 25, 1977, the jury panel was sworn and qualified.

On April 26, 1977, individual voir dire examination of members of the jury panel began; it continued until 1:00 P.M. April 29, 1977, when the jury was selected and instructed.

On May 2, 1977, the Appellant was arraigned before the jury and pled "Not Guilty." On May 2, 1977, evidence began in the First Trial on the Merits. On May 3, 1977, the First Trial on the Merits ended.

On May 4, 1977, the Court entered its "Order Declaring Mistrial and Discharging Jury" because of the inability of the jury to reach a unanimous verdict on question #3 of the charge.

On May 27, 1977, this case was reset for new trial to August 22, 1977.

On August 11, 1977, pursuant to a Pauper's Oath submitted by Appellant, the Court appointed Robert "Bob" Tarrant of Houston, Texas (who was employed by Appellant in the First Trial of this cause, and Don R. Irvin of Alvin, Texas as attorneys for Appellant in the Second Trial of this cause.

On August 17, 1977, pursuant to the Defendant's Motion for Continuance, the Court re-set the Second Trial of this cause for October 19, 1977.

On August 22, 1977, and at the request of the Defendant, the Court appointed a third attorney, Sam Bass, Jr. of Freeport, Texas, to work with Appellant's other two attorneys in the Second Trial of this cause.

On October 10, 1977, the jury panel was organized, sworn and instructed. Individual voir dire examination of the members of the jruy panel began and continued until October 14, 1977, when selection of the jury was completed.

On October 19, 1977, the jury in the Second Trial of this cause found the Defendant "guilty of capital murder," as charged in the indictment.

On October 19, 1977, the Hearing on Punishment in the Second Trial on the Merits began and continued until October 20, 1977.

On October 20, 1977, the charge on punishment (containing the three issues) was submitted to the jury; the jury returned a unanimous answer of "yes" to all three questions contained in the charge on punishment. The Court then pro-

NOUNCED THE JUDGMENT AND ASSESSED APPELLANT'S PUNISHMENT AT DEATH.

ON NOVEMBER 10, 1977, THE APPELLANT'S MOTION FOR NEW TRIAL WAS HEARD BY THE COURT AND OVERRULED. THE COURT THEN PRONOUNCED SENTENCE BUT SUSPENDED IMPOSITION OF SENTENCE FOR APPELLANT'S AUTOMATIC APPEAL TO THE COURT OF CRIMINAL APPEALS.

ON NOVEMBER 14, 1977, APPELLANT PRESENTED AND THE COURT OVERRULED APPELLANT'S FIRST AMENDED MOTION FOR NEW TRIAL.

THE STATEMENT OF FACTS OF THE SECOND TRIAL WAS TIMELY FILED IN THE TRIAL COURT; THE TRANSCRIPT OF THE SECOND TRIAL WAS TIMELY FILED IN THE TRIAL COURT. THE TRIAL COURT APPROVED THE RECORD AS IT APPLIED TO THE SECOND TRIAL IN THIS CAUSE. (ALTHOUGH THE COURT REPORTER REPORTED THE FIRST TRIAL ON THE MERITS IN THE CAUSE, HIS NOTES WERE NOT TRANSCRIBED INTO A STATEMENT OF FACTS. THOSE NOTES HAVE NOW BEEN LOST OR MISPLACED.) SOME DOCUMENTS CONTAINED IN THE RECORD OF THE FIRST TRIAL OF THIS CAUSE, BUT NOT INCLUDED IN THE RECORD OF THE SECOND TRIAL, AND THUS NOT HERETOFORE PRESENTED TO THIS COURT OF CRIMINAL APPEALS, ARE CONTAINED IN THE "SUPPLEMENTAL TRANSCRIPT."

THE APPELLANT TIMELY FILED HIS APPELLATE BRIEF. THE APPELLEE TIMELY FILED HIS "BRIEF FOR APPELLEE."

ON SEPTEMBER 20, 1978, THE COURT OF CRIMINAL APPEALS RENDERED ITS OPINION IN THIS CAUSE, A COPY OF WHICH IS ATTACHED HERETO.

ON THE 11TH DAY OF DECEMBER, 1978, THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS ENTERED ITS ORDER AS FOLLOWS:

"THIS APPEAL IS UNDER SUBMISSION TO THIS COURT ON THE STATE'S MOTION FOR REHEARING. IN CONSIDERING THAT MOTION WE HAVE DETERMINED THAT IT WOULD BE RELEVANT FOR US TO REVIEW THE TRANSCRIPTION OF THE COURT REPORTER'S NOTES OF THE TESTIMONY, IF ANY, OF DR. B. W. HENRY AT THE PUNISHMENT PHASE OF THE APPELLANT'S FIRST TRIAL IN CAUSE NO. 10,509 IN THE 23RD JUDICIAL DISTRICT COURT OF BRAZORIA COUNTY WHICH TERMINATED IN A MISTRIAL ON MAY 6, 1977."

"THE HONORABLE PAUL FERGUSON, JUDGE OF THE 149TH JUDICIAL DISTRICT OF TEXAS, WHO PRESIDED AT SAID TRIAL IN THE 23RD JUDICIAL DISTRICT COURT, IS HEREBY DIRECTED TO FORTHWITH DIRECT THE COURT REPORTER WHO TOOK THE NOTES OF THE PUNISHMENT PHASE OF SAID TRIAL TO FORTHWITH PREPARE AND FILE WITH THE CLERK OF THIS COURT A TRANSCRIPTION OF THE TESTIMONY, IF ANY, OF DR. B. W. HENRY AT THE PUNISHMENT PHASE OF SAID TRIAL. IT IS FURTHER ORDERED THAT SAID TRANSCRIPTION SHALL BE FILED NO MORE THAN THIRTY DAYS FROM THIS DATE."

ON FEBRUARY 28, 1979, THIS COURT OF CRIMINAL APPEALS RENDERED ITS OPINION ON STATE'S MOTION FOR REHEARING IN THIS CAUSE, A COPY OF WHICH IS ATTACHED HERETO.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

IN HIS BRIEF BEFORE THE TEXAS COURT OF CRIMINAL APPEALS AND HIS REHEARING APPLICATION ADDRESSED TO THAT COURT, PETITIONER CONTENDED THAT THE EXCLUSION OF HIS RIGHT TO A PSYCHOLOGIST VIOLATED HIS RIGHT TO A FAIR TRIAL UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT. THE COURT OF CRIMINAL APPEALS REJECTED THIS CONTENTION IN AFFIRMING HIS CONVICTION AND SENTENCE AND DENYING REHEARING.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE RULE OF JUREK V TEXAS, 23 CR.L. 3215 (1978) WAS

VIOLATED BY THE FAILURE TO ALLOW THE DEFENDANT TO SEEK A PSYCHOLOGIST TO TESTIFY AS TO THE THIRD ISSUE UNDER THE DEATH PENALTY STATUTE SO THAT A JUROR WOULD BE ABLE TO SEE WHATEVER MITIGATING CIRCUMSTANCES THE DEFENDANT MIGHT BE ABLE TO ALLOW.

AT PETITIONER'S TRIAL, THE DEFENDANT'S MOTION FOR A PSYCHOLOGIST OF HIS CHOICE WAS DENIED AND THE STATE WAS ALLOWED TO PUT ON THE TESTIMONY OF A PSYCHOLOGIST OVER THE DEFENDANT'S OBJECTION.

THE COURT ERRED IN PERMITTING THE PSYCHIATRIST, DR. HENRY, TO TESTIFY IN THE PUNISHMENT STAGE OF THE TRIAL CONCERNING THE "PROBABILITY" THAT THE DEFENDANT WOULD COMMIT FURTHER CRIMES OF VIOLENCE, THE SAME BEING BEYOND THE ORDER OF THE COURT TO DETERMINE EVENTUAL COMPETENCY TO STAND TRIAL AND IN REFUSING TO APPOINT A PSYCHOLOGIST OF THE DEFENDANT'S CHOICE TO TESTIFY AS TO THE PROBABILITY THAT HE WOULD COMMIT FUTURE CRIMINAL ACTS OF VIOLENCE AND IN REFUSING TO REQUIRE THE STATE TO INTRODUCE THE COURT'S ORDER FOR AN EXAMINATION OF THE DEFENDANT AS TO "MENTAL COMPETENCE TO STAND TRIAL."

THE ORDER OF THE COURT FOR THE APPOINTMENT OF A PSYCHIATRIST TO EXAMINE THE DEFENDANT WAS ENTERED ON THE 20TH DAY OF APRIL, A.D., 1977. (TRANSCRIPT, P. 1505)

THE ORDER RECITES ". . .IT COMING TO THE ATTENTION OF THE COURT THAT THE ISSUES OF 'INCOMPETENCY TO STAND TRIAL' MAY BE RAISED, . . ." "WITH REGARD TO HIS COMPETENCY TO STAND TRIAL,. . ."

THE COURT ORDER WAS INTRODUCED ON CROSS-EXAMINATION OF THE WITNESS. (S.F. P 1271, L 6-15) THE ORDER WAS READ TO THE JURY. (S.F. P 1271, L 23-P 1272, L 15)

THE TESTIMONY OF THE WITNESS, DR. HENRY, FROM THE ORDER SAID, "IT ORDERS AN EVALUATION WITH REGARDS TO 'COMPETENCY TO STAND TRIAL'." (S.F. P 1272, L 19-23)

AT NO POINT IN TIME DURING THE EXAMINATION OF THE WITNESS, DR. HENRY, DID THE STATE, THROUGH THE STATE'S ATTORNEY, EVER ASK THE QUESTION "IS THE DEFENDANT, WILLIAM JACK HAMMETT, MENTALLY COMPETENT TO STAND TRIAL?" (S.F. P 1239, L 9-P 1262, L 17) TO THE CONTRARY, THE STATE ATTEMPTED ONLY TO SECURE AN ANSWER FROM THE WITNESS, DR. HENRY, TO THE ISSUE TO BE SUBMITTED TO THE JURY, TO-WIT: "WHETHER THERE IS A PROBABILITY THAT THE DEFENDANT WOULD COMMIT CRIMINAL ACTS OF VIOLENCE THAT WOULD CONSTITUTE A CONTINUING THREAT TO SOCIETY." (S.F. P 1256, L 4-P 1259, L 5)

THE QUESTION OF COMPETENCY OR SANITY HAD NEVER BEEN RAISED, NO JUROR WAS QUESTIONED ON THE ISSUE OF COMPETENCY TO STAND TRIAL OR ON THE ISSUE OF MENTAL SANITY, NO EVIDENCE AT THE GUILT OR PUNISHMENT STAGE WAS RAISED OR INTRODUCED BY THE DEFENSE AS TO THE DEFENDANT'S COMPETENCY TO STAND TRIAL OR AS TO THE DEFENDANT'S SANITY OR ANY OTHER POTENTIAL PERSONALITY DISORDERS.

IT IS THE OPINION OF THIS WRITER THAT "THE CIRCUMSTANCES SURROUNDING THE STATE'S PRESENTATION OF DR. HENRY'S TESTIMONY AT THE PUNISHMENT STAGE OF THE TRIAL WAS GROSSLY UNFAIR AND THE DEFENDANT WAS THUS DENIED DUE PROCESS OF LAW" I.E. ERNEST BENJAMIN SMITH VS W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL, NO. CA3-77-0544-F,

In the United States District Court for the Northern District of Texas, Dallas Division, opinion of _____, Judge. The reasons are:

(1) The doctor's testimony exceeded the authority granted under the court's order. (T p 1505) Such testimony being allowed violates Amendment IV and XIV of the Constitution of the United States of America.

(2) The Defendant was denied the right to secure expert opinion testimony on such issue by the Court's refusal to grant the Defendant's Motion for a Psychologist. (T p 1632-1634) Such action is in violation of Amendment VI and XIV of the Constitution of the United States of America.

(3) In not requiring the State to introduce the Court's order for an examination as to the Defendant's mental competency to stand trial, and permitting the witness and the State to imply to the jury that the examination was to all points, and not only to this point of "mental competnecy to stand trial." Such action is in violation of Amendment V and XIV of the Constitution of the United States of America.

(4) In permitting the witness, Dr. Henry, to form opinions based upon his examination of the Defendant's juvenile criminal record and upon unproven allegations of crimes in Harris County, Texas, as shown in the State's Exhibit 17. (S.F. p 1234, l 12-p 1236, l 23) (S.F. p 1427-1431) (S.F. p 1489-1494) Such action is in violation of Amendment IV, V, VI and XIV of the Constitution of the United States of America.

That the Defendant was effectively denied the right to present complete testimony regarding mitigating factors on

his alleged personality disorder which supposedly enables him a continuing threat to society because he was denied the right for a psychologist for testimony to contradict or explain the differences between the testimony of another expert and the witness, Dr. Henry. Such action is in violation of Amendment V and XIV of the Constitution of the United States of America.

That the Defendant was denied the right to effective assistance of counsel because of the methods of the employment of the State with regard to the testimony of Dr. Henry in that the Defendant was not allowed an opportunity to such expert opinion testimony in rebuttal to the testimony of Dr. Henry. (T p 1632-1634) Such action is in violation of Amendment IV, V, VI and XIV of the Constitution of the United States of America.

That failure to provide expert psychiatric assistance may deprive an indigent defendant of effective assistance of counsel. Greer vs Beto (379 F2d 923, 924, 5th Cir. 1967); Hintz vs Beto (379 F2d, 937, 5th Cir. 1967) Contrary to the provisions of Amendment VIII of the United States of America.

That the Defendant was not advised of his right to remain silent at the psychiatric examination on any question other than "his competency to stand trial" where he did not seek to introduce psychiatric testimony on the issue himself at the guilt/innocence stage of the trial, or on the punishment stage of the trial and where he was denied the right to such expert opinion through an examination as to the issue of the "probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society"

AFTER A REQUEST THEREUPON HAD BEEN DULY MADE BEFORE THE TRIAL OF THE CASE UPON THE FACTS. SUCH ACTION IS IN VIOLATION OF AMENDMENT IV, V, VI AND XIV OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

IT WAS OBVIOUS TO THIS WRITER THAT THE STATE WOULD ATTEMPT TO USE DR. HENRY AS TO THIS ISSUE DURING PUNISHMENT CONTRARY TO THE ORDER OF THE COURT AND WITHOUT THE DEFENDANT HAVING AN OPPORTUNITY TO SEEK EXPERT ADVICE AND OPINION AND THAT IS WHY THE REQUEST (T P 1632-1634) WAS DULY AND TIMELY FILED. IF THE REQUEST HAD BEEN GRANTED BY THE COURT, THE DEFENDANT COULD HAVE BEEN AVAILABLE FOR INTERVIEW FOR AT LEAST FOUR (4) HOURS PER DAY FOR A PERIOD OF AT LEAST FOUR (4) DAYS, WHICH IS MORE TIME THAN THE WITNESS, DR. HENRY, HAD WITH THE DEFENDANT FOR HIS INTERVIEW. SEE SLAYTON VS STATE (CR. APP. 1967) 418 SW2D 508. SUCH ACTION IS IN VIOLATION OF AMENDMENT IV, V, VI AND XIV OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

THAT THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS HAS REFUSED TO ANSWER THE CONSTITUTIONAL ISSUES UNDER THE TEXAS CONSTITUTION, TO-WIT: ARTICLE 3, SECTION 31 AND 35.

ON FEBRUARY 28, 1979, THIS COURT OF CRIMINAL APPEALS RENDERED ITS OPINION IN THIS CAUSE WHEREIN IT RULED THAT THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS HAS PREVIOUSLY REJECTED APPELLANT'S POSITION SET FORTH IN THE APPELLANT'S THIRTEENTH AND FINAL GROUND OF ERROR IN THAT THE CAPITAL MURDER PROVISION OF THE TEXAS PENAL CODE IS UNCONSTITUTIONAL. BASED ON THE OPINION OF THE COURT SET FORTH IN ITS WRITTEN OPINION OF FEBRUARY 28, 1979, THE COURT ONLY DEALS WITH ARTICLE 3, SECTION 35 OF THE TEXAS CONSTITUTION AND WHOLLY FAILS TO

ALLUED TO ARTICLE 3, SECTION 31 OF THE TEXAS CONSTITUTION AND TO DISCUSS THIS PROVISION OF THE TEXAS CONSTITUTION WHICH WAS EXPRESSLY ARGUED BEFORE THE COURT OF CRIMINAL APPEALS ON THE 17TH DAY OF MAY, 1978, BY THE APPELLANT'S ATTORNEY WHO WAS BEFORE THE COURT FOR THE ORAL ARGUMENT. FURTHER, THIS PROVISION OF ARTICLE 3, SECTION 31, OF THE TEXAS CONSTITUTION, WAS SPECIFICALLY SET FORTH IN THE APPELLANT'S ORIGINAL BRIEF, PAGES 30-31, UNDER PARAGRAPH 3 OF GROUND OF ERROR 13. THE COURT, BY ITS OPINION, HAS SAID, AS TO THE APPELLANT'S THIRTEENTH AND FINAL GROUND OF ERROR, "THIS PRECISE CONTENTION HAS BEEN PREVIOUSLY REJECTED BY THIS COURT." SMITH V STATE, 540 SW2D 693 (TEX.CR.APP.), CERT. DENIED, 434 U.S. 935 (1977) "APPELLANT'S THIRTEENTH GROUND OF ERROR IS OVERRULED."

THIS WRITER WOULD APPRECIATE AN OPPORTUNITY TO ADDRESS HIMSELF TO THAT PROPOSITION SET FORTH IN THE COURT'S OPINION AS HAVING PREVIOUSLY REJECTED THE PRECISE CONTENTIONS SET FORTH IN THE APPELLANT'S THIRTEENTH GROUND OF ERROR OF HIS ORIGINAL BRIEF.

THE COURT CITED SMITH V STATE, 540 SW2D 693 (TEX. CR.APP. 1976), CERT. DENIED 430 U.S. 922 (1977), WHEREIN THE COURT SAID,

> "(7) IN GROUNDS OF ERROR FIVE AND SIX, APPELLANT ATTACKS THE CONSTITUTIONALITY OF ARTICLE 1257, SUPRA, SEC. 19.03, V.T.C.A., PENAL CODE, AND ARTICLE 37.071, SUPRA. HIS CONTENTIONS HAVE BEEN ANSWERED ADVERSELY TO HIM IN OUR RECENT OPINION IN JUREK V STATE, TEX.CR.APP. 522 SW2D 934."
>
> "(8) APPELLANT ALSO CONTENDS THAT THE CAPTION OF THE DEATH PENALTY STATUTE UNDER WHICH HE WAS TRIED, ARTICLE 1257, SUPRA, FAILS TO MEET THE REQUIREMENTS OF ARTICLE III, SEC. 35 OF THE TEXAS CONSTITUTION IN

THAT IT EMBRACES MORE THAN ONE SUBJECT AND IS THEREFORE INSUFFICIENT TO APPRISE THE LEGISLATURE AND THE PUBLIC OF THE FULL EFFECT OF THE AMENDMENT."

"APPELLANT'S BRIEF CONTAINS NO CITATION OF AUTHORITY, AND NO DISCUSSION OF HIS CONTENTION. WITHOUT FURTHER ELABORATION FROM HIM, WE ARE UNABLE TO MEET APPELLANT'S CONTENTION OTHER THAN TO OBSERVE THAT THE CAPTION COVERS THE ONE SUBJECT LEGISLATED BY THE ACT."

IN THIS CITATION OF SMITH V STATE, THE COURT SAID, "HIS CONTENTIONS HAVE BEEN ANSWERED ADVERSLEY TO HIM IN OUR RECENT OPINION OF JUREK V STATE, TEX.CR.APP., 522 SW2D 934."

AND, THE COURT FURTHER SAID, "APPELLANT'S BRIEF CONTAINS NO CITATION OF AUTHORITY, AND NO DISCUSSION OF HIS CONTENTION. WITHOUT FURTHER ELABORATION FROM HIM, WE ARE UNABLE TO TREAT APPELLANT'S CONTENTION OTHER THAN TO OBSERVE THAT THE CAPTION COVERS THE ONE SUBJECT LEGISLATED UPON BY THE ACT."

SINCE THERE IS NO DISCUSSION, IT WOULD SEEM THAT THE PROVISIONS OF THIS APPELLANT'S BRIEF POINT THIRTEEN ON THE CONSTITUTIONALITY OF THE ACT, IS STILL WIDE OPEN, FOR THE COURT SAID FURTHER, "WE ARE UNABLE TO MEET APPELLANT'S CONTENTION," THEN THE COURT SAID, "THE CAPTION COVERS THE ONE SUBJECT LEGISLATED UPON BY THE ACT," BUT THE COURT DID NOT WRITE IN ITS OPINION CONCERNING THE PROVISION OF THE "ACT" COMPLYING WITH ARTICLE 3, SECTION 31 AND ARTICLE 3, SECTION 35 OF THE TEXAS CONSTITUTION.

IF THIS WRITER IS READING THE COURT'S OPINION CORRECTLY, IT APPEARS THAT THE COURT IS HOLDING THE ACT "CONSTITUTIONAL" IN LINE WITH ITS HOLDING UNDER THE CASE OF JUREK V STATE, TEX.CR.APP., 522 SW2D 934, CITED IN THE CASE OF SMITH V STATE, THIS HONORABLE COURT SAID:

"WE ARE MET AT THE OUTSET WITH APPELLANT'S CONTENTION THAT THE ASSESSMENT OF THE DEATH PENALTY UNDER ARTICLE 1257, SUPRA, AND ARTICLE 37.071, SUPRA, IS CRUEL AND UNUSUAL PUNISHMENT UNDER THE HOLDING OF THE SUPREME COURT OF THE UNITED STATES IN FURMAN V GEORGIA, 408 U.S. 238, 92 S.CT. 2726, 32 L.ED.2D 346, (1972), AND THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITES STATES CONSTITUTION."

FURTHER, THE COURT IN JUREK V STATE, STATED THAT THERE WERE THREE (3) QUESTIONS THAT THEY WERE REQUIRED TO ANSWER CONCERNING THE ENACTMENT OF HOUSE BILL 200 AND THOSE THREE (3) QUESTIONS SET FORTH BY THE COURT ARE AS FOLLOWS, TO-WIT:

(1) ARTICLE 1257, SUPRA, AND ARTICLE 37.071, SUPRA, WERE ENACTED IN RESPONSE TO FURMAN. THE QUESTION BEFORE US IS WHETHER THESE STATUTES ARE VALID UNDER THAT HOLDING. DO THEY PROVIDE EFFECTIVE GUIDANCE TO THE JURY? DO THEY ADEQUATELY LIMIT THE DISCRETION OF THE JURY? DO THEY GUARD AGAINST THE ARBITRARY AND STANDARDLESS IMPOSITION OF THE DEATH PENALTY?

THOSE THREE (3) QUESTIONS WERE ANSWERED IN THE JUREK V STATE CASE BY THE FOLLOWING LANGUAGE, TO-WIT: "WE HOLD THEY DO," WITH A FURTHER STATEMENT AS FOLLOWS, TO-WIT:

"(2) WE REJECT APPELLANT'S CONTENTION THAT ARTICLE 37.071(B), SUPRA, IS TOO VAGUE TO PROVIDE ADEQUATE GUIDANCE TO THE JURY."

IT THEREFORE APPEARS THAT THE CONTENTIONS SET FORTH IN THIS APPELLANT'S ORIGINAL BRIEF AS POINT THIRTEEN CONCERNING THE PROVISIONS OF ARTICLE 3, SECTIONS 31 AND 35 OF THE TEXAS CONSTITUTION, HAS NOT YET BEEN RULED UPON BY THIS COURT.

THE COURT THEN CITED THE CASE OF BURNS V STATE, 556 SW2D 270, (TEX.CR.APP.) CERT. DENIED, 434 U.S. 935 (1977). IN THAT CASE, BURNS V STATE, THE FOLLOWING APPEARS, TO-WIT:

"(1) AT THE OUTSET, APPELLANT CONTENDS, 'ARTICLE 1257, AS AMENDED IN 1973, IS UNCONSTITUTIONAL FOR THE REASON THAT THE

CAPTION OR TITLE TO THE 1973 ACT, H.B. 200, APPEARING IN CHAPTER 426, ACTS, REGULAR SESSION OF THE 63RD LEGISLATURE, 1973, FAILS TO MEET THE REQUIREMENTS OF ARTICLE 3, SECTION 35 OF THE TEXAS CONSTITUTION IN THAT IT 'EMBRACES MORE THAN ONE SUBJECT' AND IS THEREFORE INSUFFICIENT TO APPRISE THE LEGISLATURE AND THE PUBLIC OF THE FULL EFFECT OF THE AMENDMENT."

TO WHICH THE COURT MADE THIS RESPONSE, TO-WIT:

"IN SMITH V STATE, TEX.CR.APP. 540 SW2D 693, THE EXACT SAME CONTENTION WAS RAISED AND REJECTED BY THIS COURT."

HERE AGAIN, THE COURT HAS REFERRED TO THE SMITH V STATECASE WHEREIN THE COURT SAYS, "THE EXACT SAME CONTENTION WAS RAISED AND REJECTED BY THIS COURT." HOWEVER, NO SUCH CONTENTION WAS EVER BEFORE THE COURT BECAUSE THE BRIEF IN THAT CASE CONTAINED NO CITATION OF AUTHORITY, AND NO DISCUSSION OF HIS CONTENTIONS PERTAINING THERETO, BUT RATHER THE COURT SAID "HIS CONTENTIONS HAVE BEEN ANSWERED ADVERSELEY TO HIM IN OUR RECENT OPINION IN JUREK V STATE, TEX.CR.APP., 522 SW2D 934."

THE JUREK V STATE CASE ONLY ANSWERED QUESTIONS OF WHETHER THE ACT, (1) PROVIDED EFFECTIVE GUIDANCE TO THE JURY; (2) ADEQUATELY LIMITED THE DISCRETION OF THE JURY; AND, (3) GUARDS AGAINST THE ARBITRARY AND STANDARDLESS IMPOSITION OF THE DEATH PENALTY.

IN THE CASE OF BURNS V STATE, THE COURT PUT THE QUESTIONS FROM THE APPELLANT AS FOLLOWS, TO-WIT:

"APPELLANT CONTENDS, "THE TRIAL COURT ERRED IN FAILING TO REMOVE CAPITAL PUNISHMENT FROM THE JURY'S CONSIDERATION BECAUSE AT THE TIME OF THE OFFENSE FOR WHICH APPELLANT WAS INDICTED, NO PENAL OFFENSE HAD BEEN MADE A CAPITAL OFFENSE BY LAW IN VIOLATION OF ARTICLES 3 AND 7, TEXAS PENAL CODE, 1925."

THEN THE COURT PHRASED THE QUESTIONS IN ANOTHER MANNER, AS FOLLOWS, TO-WIT:

"APPELLANT'S CONTENTION IS BOTTOMED ON THE FOLLOWING ARGUMENTS: (1) ARTICLE 1256, V.A.C.P. DID NOT CREATE A SEPARATE OFFENSE OF "CAPITAL MURDER" AS DISTINGUISHED FROM OTHER KINDS OF MURDER; (2) THAT ARTICLE 1257, V.A.C.P. MERELY ESTABLISHED THE PUNISHMENTS ASSESSED FOR DIFFERENT KINDS OF MURDER; (3) THAT ARTICLE 1256, SUPRA, AND ARTICLE 1257, SUPRA, AS AMENDED IN 1973 (PROVIDING FOR THE PENALTY OF LIFE OR DEATH UPON CONVICTION FOR MURDER WITH MALICE AFORETHOUGHT UNDER CERTAIN CIRCUMSTANCES) ARE MUTUALLY EXCLUSIVE; (4) THAT ARTICLE 3, V.A.C.P. DECLARED THAT, 'NO PERSON SHALL BE PUNISHED FOR ANY ACT OR OMISSION, UNLESS THE SAME SHALL BE MADE A PENAL OFFENSE, AND A PENALTY IS AFFIXED THERETO BY THE WRITTEN LAWS OF THIS STATE;' (5) THAT BECAUSE OF ARTICLE 3, SUPRA, IT WAS NECESSARY THAT THERE HAVE BEEN A SEPARATELY DECLARED OFFENSE OF CAPITAL MURDER; AND, (6) THAT SINCE THERE WAS NO SUCH SEPARATELY DECLARED OFFENSE OF CAPITAL MURDER, THE APPELLANT COULD NOT BE VALIDLY CONVICTED OF CAPITAL MURDER."

TO WHICH THE COURT MADE THE FOLLOWING STATEMENT, TO-WIT:

"(2) THE LANGUAGE IN SUBSECTIONS (A) AND (B) NEGATES APPELLANT'S ARGUMENT THAT 1256, SUPRA AND 1257, SUPRA, ARE MUTUALLY EXCLUSIVE. JUST AS 1257B, V.A.C.P. PROVIDED THAT MURDER WITHOUT MALICE CANNOT CARRY A PENALTY LONGER THAN FIVE YEARS UPON CONVICTION, THE ARTICLE UNDER ATTACK PROVIDES FOR THE PENALTY RANGE FOR MURDER WITH MALICE ABSENT THE CIRCUMSTANCES SET FORTH IN SUBSECTION (B) OF 1257, SUPRA, AND THE PENALTY UNDER THE CIRCUMSTANCES SET FORTH THEREIN. WE REJECT APPELLANT'S CONTENTION THAT THERE HAD TO BE A SEPARATELY DECLARED OFFENSE OF CAPITAL MURDER."

THE COURT HAS NOT IN THIS OPINION OF BURNS V STATE, ADDRESSED ITSELF TO THE POINTS SET FORTH IN POINT THIRTEEN OF THE BRIEF IN THE CASE NOW BEFORE THE COURT.

ALL OF THE CASES CITED BY THE COURT IN ITS OPINION IN THE CASE NOW BEFORE THE COURT REFERS TO AND IS TIED TO THE OPINION SET FORTH IN THE CASE OF JUREK V STATE, WHEREIN THIS COURT ADDRESSED ITSELF STRICTLY TO THE QUESTIONS OF "(1) DO THEY PROVIDE EFFECTIVE GUIDANCE TO THE JURY?" "(2) DO THEY

ADEQUATELY LIMIT THE DISCRETION OF THE JURY?" AND, "(3) DO THEY GUARD AGAINST THE ARBITRARY AND STANDARDLESS IMPOSITION OF THE DEATH PENALTY?"

NONE OF THESE QUESTIONS, AND THE COURT'S ANSWER TO THEM, GOES TO THE QUESTION OF THE CONSTITUTIONALITY OF HOUSE BILL 200 UNDER ARTICLE 3, SECTIONS 31 AND 35 OF THE TEXAS CONSTITUTION.

ARTICLE 3, SECTION 31 OF THE CONSTITUTION READS AS FOLLOWS, TO-WIT:

> SEC. 31. ORIGINATION IN EITHER HOUSE; AMENDMENT.
> SEC. 31. BILLS MAY ORIGINATE IN EITHER HOUSE, AND, WHEN PASSED BY SUCH HOUSE, MAY BE AMENDED, ALTERED OR REJECTED BY THE OTHER.

THIS ACT IS UNCONSTITUTIONAL AND VOID BECAUSE THE LEGISLATURE ATTEMPTED TO AMEND A BILL PENDING IN SAID LEGISLATURE BY ENACTING ANOTHER BILL TO SO AMEND, IN VIOLATION OF ARTICLE 3, SEC. 31 OF THE TEXAS CONSTITUTION, VERNON'S TEXAS CONSTITUTION. THAT PROVISION PROVIDES THAT A BILL MAY BE AMENDED BY THE OTHER HOUSE OF THE LEGISLATURE FROM THAT WHICH IT ORIGINATED. THE AMENDMENTS TO THE BILL ARE THEN ATTACHED TO IT WITH THE BILL BEING VOTED ON AS A WHOLE. HOWEVER, THIS PROCEDURE WAS NOT FOLLOWED IN ENACTING THE STATUTE UNDER WHICH THE PRESENT CASE IS BEING PROSECUTED. OR, IN OTHER WORDS, ONE BILL AMENDED ANOTHER BILL. HOW COULD A LEGISLATOR OR THE PUBLIC POSSIBLY HAVE FAIR NOTICE OF THE CONTENTS OF THE LAW WHICH HOUSE BILL 200 PURPORTED TO AMEND, WHEN THAT LAW HAD NOT EVEN BEEN ENACTED AND WAS NOT ENACTED OR MADE LAW BEFORE HOUSE BILL 200? HOW EASILY LEGISLATORS OR THE PUBLIC COULD BE MISLED IF BILLS WERE ALLOWED TO AMEND BILLS, RATHER THAN AMEND LAWS WHICH ARE IN EFFECT, PUBLISHED AND LOCATED SO THAT THEY MAY BE READ AND USED BY THOSE CONCERNED. SEE AMERICAN INDEMNITY CO. V

CITY OF AUSTIN, 246 SW 1019, WHEREIN IT IS SAID,

> "THE LAW TO BE JUST AND EFFECTIVE MUST BE ACCESSIBLE AND CERTAIN. TO SAY THAT THE CITIZEN, IN ORDER TO KNOW THE LAW BY WHICH HIS RIGHTS ARE TO BE DETERMINED, MUST GO THROUGH THE MANY VOLUMES OF SESSION LAWS ENACTED BY NEARLY 40 DIFFERENT LEGISLATURES, AND EXAMINE THE ORIGINAL ACTS, INCLUDING THE CAPTIONS AND REPEALING ACTS AND CLAUSES, IS NOT TO BE SERIOUSLY CONSIDERED. THE ROMAN CITIZEN WHO HAD TO READ ONLY 3,000 PLATES OF BRASS, ON WHICH HIS LAWS WERE RECORDED, HAD, AS COMPARED TO THIS, AN EASY UNDERTAKING. THE SESSION LAWS ARE FOR ALL PRACTICAL PURPOSES, INACCESSIBLE TO THE AVERAGE CITIZEN, AND THE TASK OF SEARCHING THROUGH THEM TO ASCERTAIN THE LAW AN INSURMOUNTABLE ONE."

IT NECESSARILY FOLLOWS THEN THAT WHEN HOUSE BILL 200 REGULAR SESSION, 63RD LEGISLATURE, 1973, AMENDED SENATE BILL 34, REGULAR SESSION, 63RD LESISLATURE, 1973, IT VIOLATED ARTICLE 3, SECTION 31 OF THE TEXAS CONSTITUTION. HOW COULD A LEGISLATOR OR THE PUBLIC POSSIBLY HAVE FAIR NOTICE OF THE CONTENTS OF THE LAW WHICH HOUSE BILL 200 PURPORTED TO AMEND, WHEN THAT LAW, I.E. SENATE BILL 34 OF THE SAME SESSION OF THE STATE LEGISLATURE, HAD NOT EVEN BEEN ENACTED, AND WAS NOT ENACTED OR MADE LAW BEFORE HOUSE BILL 200? HOW EASILY LEGISLATORS OR THE PUBLIC COULD BE MISLED IF BILLS WERE ALLOWED TO AMEND BILLS, RATHER THAN AMEND LAWS WHICH ARE IN EFFECT, PUBLISHED AND LOCATED SO THAT THEY MAY BE READ AND USED BY BOTH THE LEGISLATURE AND THE GENERAL PUBLIC AT LARGE.

ARTICLE 3, SECTION 35, TEXAS CONSTITUTION, PROVIDES AS FOLLOWS, TO-WIT:

> SEC. 35. SUBJECT AND TITLES OF BILLS.
> SEC. 35. NO BILL (EXCEPT GENERAL APPROPRIATION BILLS, WHICH MAY EMBRACE THE VARIOUS SUBJECTS AND ACCOUNTS, FOR AND ON ACCOUNT OF WHICH MONEYS ARE APPROPRIATED) SHALL CONTAIN MORE THAN ONE SUBJECT, WHICH SHALL BE EXPRESSED IN ITS TITLE. BUT IF ANY SUBJECT SHALL BE EMBRACED IN AN ACT WHICH SHALL NOT BE EXPRESSED IN THE TITLE, SUCH ACT SHALL

BE VOID ONLY AS TO SO MUCH THEREOF, AS SHALL NOT BE SO EXPRESSED."

NOW, THEREFORE, SINCE THE CASES OF SMITH V STATE AND JUREK V STATE, HAVE NOT BEEN APPLICABLE TO ARTICLE 3, SECTION 35, TEXAS CONSTITUTION, THE PROVISIONS OF POINT THIRTEEN OF THE ORIGINAL BRIEF IN THIS CASE BEFORE THE COURT, IS OR SHOULD BE PROPERLY BEFORE THE COURT FOR RULING AND THIS WRITER STRONGLY URGES THE COURT TO RECONSIDER THE SAME. I SET FORTH THE INTERPRETIVE COMMENTARY SET FORTH UNDER ARTICLE 3, SECTION 35 OF THE TEXAS CONSTITUTION, TO-WIT:

"IN ENGLISH PARLIAMENTARY PRACTICE TITLES WERE ORIGINALLY OF NO IMPORTANCE FOR THEY WERE NOT USED AT ALL IN THE FIRST 200 YEARS OF PARLIAMENTARY LAW-MAKING HISTORY. IN THE TIME OF HENRY VIII, THE PRACTICE DID EVOLVE OF GIVING EACH CHAPTER A TITLE, BUT EVEN THEN THE LAW DID NOT CONSIDER THE TITLE A PART OF THE ACT."

"TITLES BECAME OF IMPORTANCE IN THE UNITED STATES WHEN STATE CONSTITUTIONAL PROVISIONS SUCH AS THAT OF TEXAS HERE CONSIDERED REQUIRING THAT BILLS NOT EMBRACE MORE THAN ONE SUBJECT AND THAT SUCH SHALL BE EXPRESSED IN THE TITLE, WERE INCLUDED TO CORRECT EVILS ARISING FROM DISHONEST TITLES AND TO PREVENT THE OBNOXIOUS PRACTICE OF PLACING IN THE SAME BILLS INCONGRUOUS SUBJECTS. IN ORDER NOT TO HAMPER UNDULY GENERALY APPROPRIATION BILLS WHICH OF NECESSITY COVER MANY SUBJECTS. TEXAS AND SEVERAL OTHER STATES EXCEPTED THEM FROM THE OPERATION OF THE RULE."

"THE PURPOSE OF THE TITLE-SUBJECT PROVISION IS THREEFOLD: FIRST, IT IS DESIGNED TO PREVENT LOG-ROLLING LEGISLATION, I.E., TO PREVENT THE WRITING OF SEVERAL SUBJECT HAVING NO CONNECTION WITH EACH OTHER IN ONE BILL FOR THE PURPOSE OF COMBINING VARIOUS INTERESTS IN SUPPORT OF THE WHOLE. SECOND, IT PREVENTS SURPRISE OR FRAUD UPON LEGISLATORS BY MEANS OF PROVISIONS IN BILLS OF WHICH THE TITLES GIVE NO INTIMATION, AND WHICH MIGHT THEREFORE BE OVERLOOKED AND CARELESSLY AND UNINTENTIONALLY ADOPTED. THIRD, IT PERMITS THE PEOPLE TO BE FAIRLY APPRISED OF THE SUBJECTS OF LESISLATION UNDER CONSIDERATION, SO THAT THEY MAY HAVE AN OPPORTUNITY OF BEING HEARD, IF THEY SO DESIRE.

"THE GENERAL PURPOSE IS ACCOMPLISHED WHEN A LAW HAS BUT ONE GENERAL SUBJECT, WHICH IS FAIRLY INDICATED BY ITS TITLE. HENCE, EVEN THOUGH THE PURPOSE OF THE ACT IS SINGLE, IT IS VOID IF IT IS NOT EXPRESSED IN THE TITLE. CONVERSELY, IF THE SUBJECTS ARE PLURAL EVEN THOUGH ADEQUATELY SET OUT IN THE TITLE, IT IS STILL VOID."

"THE SECOND SENTENCE OF SECTION 35, HOWEVER, SIGNIFIES THAT WHEN AN ACT CONTAINS TWO OR MORE SUBJECTS AND ONE OF THEM IS EXPRESSED IN THE TITLE, THE ACT IS INVALID ONLY TO THAT NOT EXPRESSED IF THE EXTRANEOUS PROVISIONS NOT WITHIN THE TITLE ARE SEPARABLE FROM THE OTHERS. SEE ARNOLD V LEONARD, 114 T 535,273 SW 799 (1925)."

"ALTHOUGH THE CONSTITUTIONAL PROVISION IS MANDATORY UPON THE LEGISLATURE, STILL THE COURTS HAVE CONSTRUED IT LIBERALLY. A STRICT CONSTRUCTION WOULD EMBARRASS, RETARD OR DEFEAT LEGISLATION AND WOULD BE UNNECESSARY TO THE BENEFICIAL PURPOSES SOUGHT TO BE ACCOMPLISHED BY THE PROVISION. SEE CANNON V HEMPHILL, 7 T. 184 (1851); BREEN V TEXAS & P.R. CO., 44 T 302 (1875)."

"THE WORK 'SUBJECT' AS USED IN THE CONSTITUTION MEANS 'THAT WHICH IS TO BE DOMINATED OR CONTROLLED BY THE PARTICULAR LAW.' DAY LAND & CATTLE CO. V STATE, 68 T 526, 4 SW 865 (1887). IN EARLIER CONSTITUTIONS THE WORK 'OBJECT' WAS USED, GENERALLY MEANING AIM OR PURPOSE. GENERALLY, THE WORDS SEEM TO BE EQUIVALENT, ALTHOUGH IT HAS BEEN HELD THAT 'SUBJECT' IS LESS RESTRICTIVE THAN 'OBJECT.' SEE FAHEY V STATE, 27 TEX.APP. 146, 11 SW 108 (1889)."

"THE CONSTITUTIONAL REQUIREMENT APPLIES TO ONE SUBJECT AND IS NOT VIOLATED IF A STATUTE CONTAINS MANY PROVISIONS; AND IT HAS ONE SUBJECT WHEN IT IS INCLUSIVE OF MATTERS GERMANE THERETO AND CONNECTED THEREWITH. WHEN A LAW HAS BUT ONE GENERAL SUBJECT OR OBJECT INDICATED BY ITS TITLE, AND DEALS WITH MATTERS RELATED DIRECTLY OR INDIRECTLY TO THE MAIN SUBJECT, WHICH HAVE A MATERIAL CONNECTION AND ARE NECESSARY TO THE ACCOMPLISHMENT OF THE ACT, IT DOES NOT DEAL WITH TWO SUBJECTS. ON THE OTHER HAND, IF IT CONTAINS DISCONNECTED OR UNRELATED SUBJECTS OR PROVISIONS NOT WITHIN THE SCOPE OF ITS TITLE, SECTION 35 IS VIOLATED. SEE EX PARTE WHITE, 82 CR.R. 85, 198 SW 583 (1916)."

"In requiring that the subject be expressed in the title, it is necessary that the title set forth the subject of the bill with sufficient clarity to give notice of the legislative purpose and intent. It must indicate the general content and scope of the act. State ex rel. Garza v Rodriguez, Civ.App. 213 SW2d 877 (1948). It must state the main subject of the act as fully, definitely, clearly and fairly as can be reasonable expected in a brief general statement. See Consolidated Underwriters v Kirby Lumber Co., Com.App. 267 SW 703 (1924)."

"On the other hand 'particular provisions are not within a given title wherein no subject at all is expressed in the title; where the ultimate subject expressed and that provided for are plainly different; where the provisions are palpably ulterior or foreign to the title; where they are separate, distinct from and not germane to the subject expressed; where by no intendment they possess a necessary or property connection with it; where they are disconnected form it and inappropriate to it; or where the provisions come clearly within the evil to be suppressed.' Consolidated Underwriters v Kirby Lumber Co., supra."

That the capital murder provision of the Texas Penal Code is unconstitutional.

The Constitution of the State of Texas, Article 3, Sec. 35, Vernon's Texas Constitution provides: "No bill (except general appropriation bills, which may embrace the various subjects and accounts, for and on account of which moneys are appropriated) shall contain more than one subject, which shall be expressed in its title. But if any subject shall be embraced in an act, which shall not be expressed in the title, such an act shall be void only as to so much thereof, as shall not be expressed."

The reason for this provision is so that the legislature and public can be advised of the nature of each bill to prevent the insertion of obnoxious clauses which might otherwise be engrafted on it. White v State, 440 SW2d 660 (Cr.App. 1969); DeSilvia v State, 299 SW 542 (Cr.App., 1921); Redding v State, 6 SW2d 360 (Cr.App. 1928); Doucette v State, 317 SW2d 200 (Cr.App., 1968); Ex Parte Hearsill, 38 SW2d 803 (Cr.App. 1931).

The Courts of this State have realized that legislators are too busy to read the entire body of every bill before it, and therefore, the caption affords the legislature and others a reasonably accurate knowledge of the contents of bills without having to read the entire text. See White v State, supra.

In determining whether a caption is sufficient to meet the requirements of this Constitutional provision (whether a bill contains only one subject, which must be expressed in the title), the Court looks at several general rules. First it has been held that a caption should be liberally construed to uphold its validity rather than giving the act a strict construction which would lead to striking down the act or a part thereof. Fletcher v State, 439 SW2d 656 (Tex. 1969); Lee v State, 352 SW2d 724 (Tex. 1962). It has been further stated that a liberal construction will not be followed to the extent of allowing the legislature to bypass constitutional restrictions. Gulf Ins. Co. v James, 185 SW2d 966 (1945). Also the case of Fletcher v State, supra, stated that when certain powers are granted by the Constitution, and the means by which these posers can be exercised are prescribed, those means are exclusive of all others. Another general rule followed by the Courts in determining the sufficiency of the title is that the Court will look to what the title says, and not to what it was intended to say. Harris County Fresh Water Supply District No. 55 v Carr, 372 SW2d 523 (Tex. 1963). In that case the Texas Supreme Court wrote:

> "THE FUNCTION OF THE TITLE REQUIREMENT IN LEGISLATIVE BILLS IS TO GIVE NOTICE DURING THE LEGISLATIVE PROCESS. THE TITLE MUST NOT ONLY EXPRESS A SUBJECT, BUT MUST FAIRLY EXPRESS, AND POINT TO, THAT WHICH IS DEALT WITH IN THE BODY OF THE ACT. ITS SUFFICIENCY IS DETERMINED BY WHAT THE TITLE SAYS AND NOT BY WHAT IT WAS INTENDED TO SAY. IT MUST GIVE FAIR NOTICE WITHIN ITSELF AND A READING MUST REASONABLY FOREWARN OF THE SUBJECT OF A STATUTE. THE CONSTITUTIONAL REQUIREMENT THAT THE SUBJECT OF A BILL SHALL BE EXPRESSED IN ITS TITLE WOULD BE RENDERED MEANINGLESS IF TITLES CAN BE LATER UPHELD BY MEANS OF A WORD TRANSPOSITION REQUIRING A STUDY OF THE BODY OF THE ACT TO ASCERTAIN WHAT WORDS ARE TO BE TRANSPOSED, AND WHERE. THE TITLE REQUIREMENT WAS DESIGNED TO ASSURE READERS OF THE TITLE DURING LEGISLATIVE PROCESS THAT THEY WOULD NOT BE REQUIRED TO STUDY THE BODY OF THE ACT TO AVOID BEING MISLED OR DECEIVED.

A SLIGHTLY DIFFERENT RULE IS FOLLOWED WHEN DEALING WITH THE CONFORMITY OF THE TITLE TO THE SUBJECT MATTER LEGISLATED ON IN THE BODY OF THE ACT, WHEN APPLIED TO AMMENDMENTS OF ACTS RATHER THAN TO TITLES OF ORIGINAL ACTS. THE RULE IS THAT WHEN THE TITLE OF AN ORIGINAL ACT EMBRACES MATTERS COVERED BY AN AMENDMENT, THE TITLE OR CAPTION OF THE AMENDMENT NEED NOT STATE THE SUBJECT OF THE LAW AMENDED OR SPECIFY THE NATURE OF THE PROPOSED AMENDMENT, BUT IF THE AMENDMENT CONTAINS ANY NEW SUBSTANTIVE MATTER WHICH IS NOT GERMANE TO THE PROVISION AMENDED, THIS NEW SUBJECT MATTER MUST BE EXPRESSED IN THE TITLE TO BE VALID. WHITE V STATE, SUPRA. THIS MEANS THAT THE NOTICE REQUIREMENTS OF ARTICLE 3, SEC. 35, ARE COMPLIED WITH REGARDING AMENDMENTS TO EXISTING LAW IF NO SUBJECT MATTER IS EXPRESSED IN THE TITLE OR CAPTION AND THE ARTICLE AMENDED IS SIMPLY REFERRED TO IN THE CAPTION. THE LEGISLATORS OR OTHER INTERESTED PERSONS CAN SIMPLY CHECK THE EXISTING LAW TO FIND OUT THE SUBJECT MATTER WITH WHICH THE AMENDMENT IS DEALING. THIS ONLY APPLIES, HOWEVER, IF THE ACTUAL SUBJECT MATTER OF THE AMEND-

MENT IS GERMANE TO THE ORIGINAL ACT IT AMENDS. IF THE AMENDMENT IS NOT GERMANE TO THE ORIGINAL ACT, THEN NOTICE OF ITS SUBJECT MATTER MUST BE STATED IN THE CAPTION UNDER ARTICLE 3, SEC. 35, VERNON'S TEXAS CONSTITUTION.

THERE IS A FURTHER RULE THAT IS APPLIED TO AMENDMENTS WHERE THE TITLE IS NOT CONTENT TO STATE A PURPOSE TO AMEND A CERTAIN STATUTE, BUT GOES FURTHER AND SPECIFIES THE PARTICULAR FIELD THE AMENDMENT IS TO COVER OR STATES A PURPOSE TO MAKE A CERTAIN CHANGE IN THE PRIOR LAW. IN THIS CASE THE AMENDATORY ACT IS LIMITED TO THE MAKING OF THE CHANGE DESIGNATED IN THE TITLE OR CAPTION, AND PRECLUDES ANY ADDITIONAL CONTRARY OR DIFFERENT AMENDMENT. WALKER V STATE, 116 SW2D 1076 (TEX.CR. APP. 1938); RUTLEDGE V ATKINSON, 101 SW2D 376 (CIV.APP., AUSTIN 1937); NO WRIT; PRAETORIANS V STATE, 186 SW2D 973 (TEX. 1945). THE CAPTION THEREOF READS AS FOLLOWS:

> "AN ACT RELATING TO THE PUNISHMENT FOR MURDER UNDER CERTAIN CIRCUMSTANCES AND CONDITIONS; AMENDING ART. 1257, PENAL CODE OF TEXAS, 1925, AMENDING CHAPTER 19, SUBCHAPTER C OF CHAPTER 12 AND SEC. 12.04, PENAL CODE (SENATE BILL 34 REGULAR SESSION, 63RD LEGISLATURE 1973); AMENDING ARTICLES 1.14 AS AMENDED, 1.15 AS AMENDED, 37.17, 40.03 AND SUBSECTION (B), SECTION 2, ART. 37.07 AND SECTION 1, ARTICLE 35.15, CODE OF CRIMINAL PROCEDURE, 1965, AND ADDING ARTICLE 37.071; AND DECLARING AN EMERGENCY."

AS CAN BE SEEN BY READING THIS CAPTION, IT PURPORTED TO LEGISLATE ON MATTERS RELATING TO THE PUNISHMENT FOR MURDER UNDER CERTAIN CIRCUMSTANCES AND CONDITIONS, AND MORE SPECIFICALLY, TO AMEND THE PENAL CODE OF 1925, WHICH WAS IN EFFECT AT THAT TIME, THE PROPOSED PENAL CODE WHICH HAD NOT YET BEEN ADOPTED AT THE TIME OF HOUSE BILL 200, AND THE CODE OF CRIMINAL PROCEDURE.

DEFENDANT URGES IN HIS BRIEF THAT THE ABOVE STATUTE

IS VOID AND UNCONSTITUTIONAL AS IT DOES NOT COMPLY WITH APPROPRIATE PROVISIONS OF THE TEXAS CONSTITUTION FOR THE REASONS WHICH FOLLOW.

I.

THE TITLE TO THE STATUTE INVOLVED HEREIN DOES NOT GIVE FAIR NOTICE OF ITS CONTENTS AS REQUIRED BY THE TEXAS CONSTITUTION AND CASE LAW (SEE WHITE V STATE, SUPRA). A READING OF THE TITLE TO THIS STATUTE GIVES NOTICE TO LEGISLATORS AND THE PUBLIC THAT THE ACT DEALS WITH PUNISHMENT FOR MURDER. HOWEVER, THE ACTUAL SUBJECT MATTER OF THE STATUTE DEALS WITH DEFINITIONS OF VARYING CLASSES OF HOMICIDES, CLASSIFICATIONS OF FELONIES, AND PROCEDURAL MATTERS, INCLUDING PROCEDURES TO ASSESS PUNISHMENT AT DEATH, ATTORNEY'S FEES, WAIVER OF RIGHTS, VOIR DIRE EXAMINATION, AND GROUNDS FOR NEW TRIAL. THE TITLE DOES NOT GIVE FAIR NOTICE TO THE TRUE CONTENTS OF THE ACT. A LEGISLATOR OR CITIZEN WOULD BE SURELY MISLED AND DECEIVED BY THIS TITLE. SEE HARRIS COUNTY FRESH WATER SUPPLY DISTRICT NO 55 V CARR, SUPRA. AN EVEN STRICTER RULE OF CONFORMITY OF TITLE TO SUBJECT MATTER IS REQUIRED FOR AMENDMENTS TO ORIGINAL ACTS, WHICH IS THE CASE HERE. SEE PRAETORIANS V STATE, SUPRA. IT SHOULD ALSO BE REMEMBERED THAT THE COURTS ARE LIMITED IN THEIR INQUIRY TO WHAT THE LEGISLATURE DID IN FACT EMBRACE BY THE TERMS EMPLOYED IN THE TITLE, AND CANNOT LOOK TO WHAT THE LEGISLATURE INTENDED TO EMBRACE. ADAMS AND WICKERS V SAN ANGELO WATER WORKS CO., 25 SW 605 (TEX. 1894).

THE HIGHEST COURTS IN THIS STATE HAVE CONSTRUED THIS REQUIREMENT OF FAIR NOTICE MANY TIMES. ONE OF THE MORE RECENT DECISIONS IS THE CASE OF WHITE V STATE, SUPRA. THAT CASE DEALT WITH THE TITLE OR CAPTION TO AN ACT AMENDING THE DANGEROUS

DRUG ACT. THE CAPTION THEREIN STATED:

> "AN ACT TO INCLUDE LYSERGIC ACID DIETHYLAMIDE AND OTHER HALLUCINOGENS IN THE LIST OF DEFINING 'DANGEROUS DRUGS;' AND SPECIFYING ITS POSSESSION TO BE AN UNLAWFUL ACT; PROVIDING THAT THE ILLEGAL SALE, MANUFACTURE, OR FURNISHING OF ANY DANGEROUS DRUG IS UNLAWFUL; AMENDING SUBSECTION (A) OF SECTION 2, SUBSECTION (D) OF SECTION 3 AND SECTION 15, CHAPTER 425, ACTS OF THE 56TH LEGISLATURE, REGULAR SESSION, 1959, AS AMENDED (ARTICLE 726D, VERNON'S TEXAS PENAL CODE); AND DECLARING AN EMERGENCY."

THE BODY OF THIS ACT, HOWEVER, DID MORE THAN INCLUDE HALLUCINOGENS IN THE DEFINITION OF DANGEROUS DRUGS AND MAKE THEIR POSSESSION UNLAWFUL, IT ALSO MADE SUBSTANTIAL CHANGES IN THE PENALTY PROVISIONS OF THE DANGEROUS DRUG ACT. THE COURT OF CRIMINAL APPEALS IN AN OPINION BY JUDGE ONION, HELD THAT THE CAPTION WAS CLEARLY INSUFFICIENT UNDER ARTICLE 3, SEC. 35, VERNON'S TEXAS CONSTITUTION, TO GIVE NOTICE OF THE ACT'S CONTENTS, AND THE ACT WAS THEREFORE VOID.

ANOTHER CASE IN POINT IS FLETCHER V STATE, SUPRA. IT DEALTH WITH THE TITLE TO THE POLYGRAPH EXAMINERS ACT WHICH STATED:

> "AN ACT RELATING TO THE LICENSING OF POLYGRAPH EXAMINERS; CREATING A POLYGRAPH EXAMINER'S BOARD; GRANTING CERTAIN POWERS TO THE POLYGRAPH EXAMINERS BOARD; ESTABLISHING MINIMUM INSTRUMENTATION REQUIREMENTS; PROVIDING FOR PENALTIES FOR VIOLATION OF PROVISIONS OF THIS ACT; AND DECLARING AN EMERGENCY."

THE BODY OF THE ACT INCLUDED IN THE DEFINITION OF POLYGRAPH EXAMINERS, ANYONE WHO USED ANY DEVISE FOR THE PURPOSE OF VERIFYING THE TRUTHE OF STATEMENTS. THE DEFENDANT WAS THE OPERATOR OF A LIE DETECTION SERVICE WHICH DID NOT USE A POLYGRAPH MACHINE. THE SUPREME COURT HELD THAT THE ACT WAS UNCONSTITUTIONAL IN THAT THE TITLE DID NOT GIVE FAIR NOTICE THAT THE ACT

APPLIED TO ANYONE IN THE FIELD OF LIE DETECTION.

A FINAL CASE TO CONSIDER IS LEE V STATE, SUPRA. THE CAPTION THEREIN STATED:

> "AN ACT CONCERNING STATE PRISON LANDS IN BRAZORIA COUNTY; AND DECLARING AN EMERGENCY."

THE BODY OF THE ACT ACTUALLY PROVIDED FOR THE CONDEMNATION OF PRIVATE LANDS BY THE DEPARTMENT OF CORRECTIONS. THE COURT HELD THE ACT PATENTLY UNCONSTITUTIONAL UNDER ARTICLE 3, SEC. 35 OF THE TEXAS CONSTITUTION.

II.

THE ACT INVOLVED IN THE CASE AT BAR IS VOID AND UNCONSTITUTIONAL IN THAT THE AMENDMENTS THEREIN ARE NOT WITHIN THE SPECIFIED SUBJECT MATTER STATED IN THE TITLE, IN VIOLATION OF ARTICLE 3, SEC. 35 OF THE TEXAS CONSTITUTION. ANY AMENDMENTS MADE BY THIS ACT ARE LIMITED TO THE SUBJECT MATTER OF "RELATING TO PUNISHMENT FOR MURDER UNDER CERTAIN CIRCUMSTANCES AND CONDITIONS." SEE WALKER V STATE, SUPRA. HOWEVER, A READING OF THE ACT FINDS THAT AMENDMENTS RELATED, AMONG OTHER THINGS, TO: (1) DEFINITIONS OF HOMICIDE, WHICH IS CERTAINLY NOT PUNISHMENT FOR MURDER; (2) CLASSIFICATIONS AND PUNISHMENTS FOR 'FELONIES;' AND, (3) PROCEDURES TO BE FOLLOWED IN CAPITAL CASES, WAIVER OF RIGHTS IN ANY CRIMINAL PROSECUTION, RIGHT TO A JURY TRIAL IN A FELONY, VOIR DIRE EXAMINATION AND GROUNDS FOR NEW TRIAL.

PROCEDURE DOES NOT RELATE TO PUNISHMENT IN ANY WAY. FOR THE ABOVE REASONS THE AMENDMENTS ARE VOID AND UNCONSTITUTIONAL.

III.

THE ACT UNDER WHICH THE DEFENDANT HEREIN IS BEING

PROSECUTED, HOUSE BILL 200, IS VOID AS FAR AS IT RELATES TO ARTICLE 37.071. ARTICLE 37.071 PRESCRIBES AN ENTIRELY NEW AND DIFFERENT PROCEDURE TO BE FOLLOWED IN CAPITAL FELONY CASES. NO NOTICE OF THIS CHANGE IN PROCEDURE IS GIVEN BY THE TITLE TO HOUSE BILL 200, ONLY THAT IT RELATES TO PUNISHMENT FOR MURDER. A SUFFICIENT NOTICE OF THIS DRASTIC PROCEDURAL CHANGE IS REQUIRED UNDER ARTICLE 3, SEC. 35, VERNON'S TEXAS CONSTITUTION. SEE WHITE V STATE, SUPRA, AND CASES CITED THEREIN. THE FAILURE TO NOTE THIS CHANGE FROM THE PRIOR IN THE TITLE COULD HAVE NO EFFECT BUT TO MISLED UNSUSPECTING LEGISLATORS AND THE PUBLIC. SEE STATE EX REL SMITH V BLACKWELL, 500 SW2D 97 (CR. APP. 1973). IN THAT CASE THE TITLE SPOKE ONLY OF A CHANGE IN PENALTIES, BUT THE ACT ITSELF, AND ONE SECTION OF THE ACT IN PARTICULAR, PROVIDED FOR A RE-SENTENCING PROCEDURE. JUDGE ONION, WRITING FOR THE COURT, STATED THAT THE CAPTION WAS ENTIRELY INADEQUATE TO GIVE NOTICE OF THIS PROVISION AND WAS, THEREFORE, UNCONSTITUTIONAL.

A MERE READING OF THE CAPTION TO ARTICLE 37.071, WITHOUT REFERENCE TO THE BODY OF THE ACT, IN NO WAY DISCLOSES THAT THE ACT WILL PROVIDE FOR A DRASTIC CHANGE IN THE PROCEDURE TO BE FOLLOWED IN THE TRIAL OF CAPITAL FELONY CASES. SEE STATE EX REL SMITH V BLACKWELL, SUPRA.

ARTICLE 37.071 OF HOUSE BILL 200 IS VOID FOR THE FURTHER REASON THAT THE CAPTION DOES NOT STATE WHETHER ARTICLE 37.071 IS A PART OF THE CODE OF CRIMINAL PROCEDURE, PENAL CODE OR OTHER CODE OF CRIMINAL PROCEDURE. EVEN AN AMENDMENT OF A PRIOR ACT MUST AT LEAST REFER TO THE CODE TO WHICH IS PERTAINS. SEE CERNOCH V COLORADO COUNTY, 48 SW2D 470 (CIV.APP. GALVESTON, 1932), NO WRIT. A DANGLING ARTICLE WITHOUT A CODE REFERENCE

OF SOME SORT IS ABSOLUTELY MEANINGLESS AND IN VIOLATION OF THE REASONABLE AND FAIR NOTICE REQUIREMENTS OF ARTICLE 3, SEC. 35 OF THE TEXAS CONSTITUTION.

IN THE EVENT THAT ONLY ARTICLE 37.071 OF HOUSE BILL 200 IS FOUND TO BE IN VIOLATION OF THE NOTICE PROVISIONS OF ARTICLE 3, SEC. 35 OF THE TEXAS CONSTITUTION, THE DEFENDANT URGES THAT THE ENTIRE ACT BE STRUCK DOWN AS UNCONSTITUTIONAL. IT IS UNDISPUTED THAT WHERE THE QUESTION OF SUFFICIENCY OR INSUFFICIENCY OF THE TITLE OR CAPTION IS RAISED, THE COURT HAS THE POWER TO ADJUDICATE THE ENTIRE ACT UNCONSTITUTIONAL. SMITH V DECKER, 312 SW2D 632 (TEX. 1958). THE REMAINDER OF THE ACT IS SO INEXTRICABLY INTERWOVEN WITH ANY INVALID PORTIONS IN THE TEXTURE OF THE ACT TO RENDER THE ENTIRE ACT INVALID. ADAMS AND WICKERS V SAN ANGELO WATER WORKS CO., SUPRA.

THAT BY REASON OF THE FOREGOING THE DEFENDANT HAS BEEN AND IS DENIED FAIR, JUST AND EQUAL PROTECTION UNDER THE LAW.

CONCLUSION

PETITIONER PRAYS THAT THE PETITION FOR WRIT OF CERTIORARI BE GRANTED.

RESPECTFULLY SUBMITTED:

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DATED: JULY 7, 1979
FREEPORT, TEXAS

Exhibit A

WILLIAM JACK HAMMETT, Appellant

NO. 58,453 vs. - - - - Appeal from BRAZORIA County

THE STATE OF TEXAS, Appellee

OPINION

This is an appeal from a conviction for capital murder in which punishment was fixed at death. V.T.C.A., Penal Code Sec. 19.03; Art. 37.071, V.A.C.C.P.

In his third ground of error appellant contends, inter alia, "The trial court erred . . . in refusing to appoint a psychologist of the Defendant's choice to testify as to the probability that he would commit future acts of violence. . ."[1] Appellant argues that the denial of his motion for appointment of a psychologist denied him the right to present testimony regarding mitigating factors on the punishment stage issue of "whether there is a probability that [he] would commit criminal acts of violence that would constitute a continuing threat to society" (Art. 37.071(b)(2), supra), and denied him the opportunity to present expert opinion testimony in rebuttal to the testimony of Dr. Henry, the State's expert witness on this punishment issue.

The State's only response to this contention is that no such request was made. The State's assertion is contradicted by the record. On the pages of the record cited in appellant's brief three times under this ground of error appears this motion:

> "Comes now the Defendant, William Jack Hammett, by and through one of his attorneys of record and files this his motion for the appointment of a psychologist for the purposes of a mental examination and as grounds therefor would show the Court as follows, to-wit:
>
> I.
>
> "That there exist[s] a need for an examination of a psychologist of the Defendant's choice to determine the mental condition of the Defendant to conform to the establish[ed] rules of society in the future so that he may have available to him the expertise of a qualified psychologist to show evidence as to questions

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[1] Since the dissent suggests this opinion "create[s] issues to rule upon" we quote the entire ground of error:

Footnote 1, continued

"The Court erred in permitting the psychiatrist, Dr. Henry, to testify in the punishment stage of the trial concerning the 'probability' that the Defendant would commit further crimes of violence, the same being beyond the order of the Court to determine eventual competency to stand trial and in refusing to appoint a psychologist of the Defendant's choice to testify as to the probability that he would commit future criminal acts of violence and in refusing to require the State to introduce the Court's order for an examination of the Defendant as to 'mental competency to stand trial.'"

Article 40.09(9), V.A.C.C.P., provides in part:

"If the defendant includes in his brief arguments supporting a particular ground of error, they shall be construed with it in determining what point of objection is sought to be presented by such ground of error; and if the court, upon consideration of such ground of error in the light of arguments made in support thereof in the brief, can identify and understand such point of objection, the same shall be reviewed notwithstanding any generality, vagueness, or any other technical defect that may exist in the language employed to set forth such ground of error."

Complaint of error "in refusing to appoint a psychologist of the Defendant's choice to testify as to the probability that he would commit future criminal acts of violence" is not only expressly raised in the ground of error; it is an integral part of his argument in support of the ground of error, being interlaced throughout the argument, and despite the State's assertion that no such request for appointment was made, appellant's brief under this ground of error three times cites the pages in the record where the motion and the court's adverse ruling appear. It is difficult to comprehend how one who feels "this Court should fairly rule upon an issue which is presented to it for a ruling" (dissent at paragraph 3) could suggest the issue is not before this Court!

of fact that may be submitted to a jury during the course of his trial.

II.

"That the Defendant is an indigent person and has not the funds or money with which to hire or acquire the professional services of a psychologist to examine him and to testify at his trial.

III.

"That there exist[s] ample time from the date of filing of this motion to the date of the submission of this cause to the jury for such an examination of the Defendant to be conducted.

"Wherefore, premises considered, the Defendant by and through his attorney prays that the Court grant this motion and order a psychologist of the Defendant's choice for a mental examination."

This motion was denied by the trial court.

In Robinson v. State, 548 S.W.2d 63, a capital murder conviction was reversed for exclusion of the expert opinion testimony of a psychologist offered by the defendant on the issue of future conduct under Art. 37.071(b)(2), supra. It was there observed that many cases had approved the use of such expert opinion testimony by the prosecution in support of the future conduct issue, citing Granviel v. State, 552 S.W.2d 107; Moore v. State, 542 S.W.2d 664; Livingston v. State, 542 S.W.2d 655; Smith v. State, 540 S.W.2d 693; Gholson and Ross v. State, 542 S.W.2d 395. In reversing the conviction in Robinson, supra, the Court emphasized that the constitutionality of the Texas death penalty scheme requires that "all possible relevant information about the individual defendant" must be presented to the jury,[2] and quoted extensively

[2] This requirement was recently reaffirmed by the United States Supreme Court in Lockett v. Ohio, ___U.S.___, 23 Cr.L. 3215 (1978), in which the Court held the Ohio death penalty statute unconstitutional, and stated, "The [Texas] statute survived the petitioner's Eighth and Fourteenth Amendment attack because three Justices [in Jurek v. Texas, supra] concluded that the Texas Court of Criminal Appeals had broadly interpreted the second question [Art. 37.071(b)(2), supra]--despite its facial narrowness--so as to permit the sentencer to consider 'whatever mitigating circumstances' the defendant might be able to show."

from the opinion of the United States Supreme Court in Jurek v. Texas, 428 U.S. 262:

> "In upholding the constitutionality of V.T.C.A., Penal Code, Section 12.43, Capital Murder, in Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), that Court said: 'A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.' In addressing itself specifically to the issue to be presented to the jury under Article 37.071 (b)(2):
>
> 'Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society',
>
> the Supreme Court said:
>
> 'What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced.'
>
> See also Granviel v. State, supra.
>
> That Court further wrote:
>
> 'By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function. . . . Because this system serves to assure that sentences of death will not be "wantonly" or "freakishly" imposed, it does not violate the Constitution. Furman v. Georgia, 408 U.S. [238], at 310, 92 S.Ct. [2726] at 2762, 33 L.Ed.2d 346.'"
>
> Robinson, supra, at 65.

The issue in this case is not the exclusion of evidence, as it was in Robinson, supra, but rather, the denial of a motion sought to permit appellant to secure such evidence in the first place.

It is not disputed that appellant was indigent: his motion for appointment of a psychologist so alleged, and his attorneys at trial and on appeal were appointed due to his indigency.

Those who face an accusation of being likely to commit criminal acts of violence that will constitute a continuing threat to

society face a peculiarly unique charge with ominous consequences. In this jurisdiction the use of the expert opinion testimony of those in the behavioral sciences has frequently been resorted to by the prosecution, and this Court has consistently approved such use, often basing the sufficiency of the evidence to support a death-producing verdict on that evidence. See, e.g., Franklin v. State, ____S.W.2d____ (No. 57348, 5/24/78); Chambers v. State, ____S.W.2d____ (No. 54676, 5/24/78); Hughes v. State, 562 S.W.2d 857; Shippy v. State, 556 S.W.2d 264; Granviel v. State, 552 S.W.2d 107; Battie v. State, 551 S.W.2d 401; Collins v. State, 548 S.W.2d 368; Moore v. State, 542 S.W.2d 664; Livingston v. State, 542 S.W.2d 655; Gholson and Ross v. State, 542 S.W.2d 395; Smith v. State, 540 S.W.2d 693. Given the role such evidence has come to play, the unique character of the issue, the extreme consequences that rest on resolution of the issue, and the tremendous diversity of opinions on such matters within the field of experts that may qualify to give such evidence on the issue, it cannot be denied that for accused persons facing the possibility of death, expert behavioral witnesses for the defense are necessities, not luxuries.

Robinson was entitled to present opinion evidence in his defense on the special issue (Robinson, supra); appellant was denied the opportunity to seek such evidence, much less present it. "[T]he evil is . . . discrimination against the indigent. For there can be no equal justice where the kind of appeal a man enjoys 'depends on the amount of money he has.' Griffin v. Illinois, [351 U.S. 12] at p. 19." Douglas v. California, 372 U.S. 353, 355. Likewise, there can be no equal justice where access to "relevant information about the individual defendant whose fate [the jury] must determine," Jurek, supra,

"depends on the amount of money he has." Griffin, supra.

> "In Burns v. Ohio, 360 U.S. 252, involving a $20 fee for filing a motion for leave to appeal a felony conviction to the Supreme Court of Ohio, this Court reaffirmed the Griffin doctrine, saying that 'once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty. * * * This principle is no less applicable where the State has afforded an indigent defendant access to the first phase of its appellate procedure but has effectively foreclosed access to the second phase of that procedure solely because of his indigency.' Id., at 257. In Smith v. Bennett, 365 U.S. 708, the Court made clear that these principles were not to be limited to direct appeals from criminal convictions, but extended alike to state post-conviction proceedings. 'Respecting the State's grant of a right to test their detention, the Court said, 'the Fourteenth Amendment weighs the interests of rich and poor criminals in equal scale, and its hand extends as far to each.' Id., at 714." Lane v. Brown, 273 U.S. 477, 483-484. (Emphasis added.)

If the scales of justice are to weigh equal regardless of wealth; if the hand of justice is to extend as far to those who cannot afford to hire an expert as to those who can; if the State is not to have exclusive access to experts; if the jury is to hear "all possible relevant information about the individual defendant whose fate it must determine," Jurek, supra, and not hear only those experts of the prosecutorial persuasion; if fairness and open inquiry are to characterize the judicial exploration of the accused's mental condition and possible future conduct: then the indigent capital murder defendant must have equal access to expert opinion psychological or psychiatric testimony from some expert of his reasonable choosing, but not necessarily his first choice. [3]

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[3] Although appellant's motion was for appointment of a psychologist of his own choice, the motion did not name a particular psychologist. Just as a defendant may not manipulate his right to counsel in such a way as to obstruct the orderly administration of justice, see Rodriguez v. State, 530 S.W.2d 944, and cases cited there, the right to appointment of a psychologist or psychiatrist may not be

We hold denial of appellant's motion for appointment of a psychologist was reversible error.

The judgment is reversed and the cause remanded.

ODOM, Judge

(Delivered September 20, 1978).

En Banc

Footnote 3, continued

manipulated in such a manner. To allow the defense an absolute right to select any expert of his choice could result in undue delay and expense.

On the other hand, while a defendant cannot choose counsel to be appointed, he must be allowed a meaningful role in the selection of the expert witness. This difference in practice is a necessary consequence of the differences between these professions. While the ethics of the legal profession require appointed counsel to be an advocate for his client and to take up the cause of the accused, the medical and behavioral counseling professions are non-adversarial in nature, and the ethics of those professions are based on adherence to one or another of the numerous doctrines, theories, or schools of thought, through which the client and his condition are examined and described. Since no single school of thought can lay valid claim to ultimate truth in such matters, it is not surprising to find advocates of various theories in adversarial postures when presenting their various interpretations of an individual case.

Just as this uncertain character of those professions gives rise to the need for the jury to hear more than the views of only the prosecution-oriented professional, and to the complementary right of the capital murder defendant to secure and present behavioral opinion testimony of an expert harmonious with the adversarial position of his side of the case; so, likewise, does the diverse character of those professions, coupled with the adversary character of the criminal process, preclude the court from selecting the defense expert, and forcing upon the accused an expert of a school of thought that is at war with his own theory of the case.

Selection of an expert for the capital murder defendant requires consideration of all these factors: (1) ultimate control of the criminal process by the trial court, (2) ultimate control of presentation of the defense by the accused's advocate, (3) avoidance of manipulation by the accused to obstruct the orderly administration of justice, and (4) avoidance of forcing an expert upon the defense who does not subscribe to a supportive school of thought. These factors must be harmonized in a way that allows the court and the defense each to fulfill its legitimate role in the process without infringing upon the proper functioning of the other.

The defense should submit a request for appointment of the expert of his choice. If the court finds the request improper on grounds of undue delay or expense that would result, the

Footnote 3 continued

defense should be so informed, so a reasonable request for appointment may be made. Refusal to submit a reasonable request, or repeated submissions of unreasonable requests, may result in a final denial for abuse of the right and undue interference with the administration of justice. No such denial should result, however, if the court and the defense approach the matter in a spirit of reasonable accommodation. The limits of reasonableness should await development on a case by case basis, should the need arise.

WILLIAM JACK HAMMETT, Appellant

NO. 58,453 vs. - - - - Appeal from BRAZORIA County

THE STATE OF TEXAS, Appellee

DISSENTING OPINION

The assignment of error under "Bill of Exception No. III" which the majority appears to be relying upon reads:

> "the court erred in permitting the psychiatrist, Dr. Henry, to testify in the punishment stage of the trial concerning the 'probability' that the defendant would commit further crimes of violence..."

Appellant's brief asserts that the reason it was error for the trial court to allow Dr. Henry to testify was because (1) the doctor's testimony exceeded the authority granted under the court's order appointing him to examine appellant; (2) the defendant was denied the right to secure expert opinion testimony on such issue by the court's refusal to grant the defendant's motion for a psychologist; and (3) the trial court refused to require the State to introduce the court's order for an examination of defendant as to "mental competence to stand trial." Any other interpretation of this assignment of error would make it multifarious and in violation of Article 40.09 V.A.C.C.P.

While I feel that this Court should fairly rule upon an issue which is presented to it for a ruling, it should not create issues to rule upon which have not been presented to the trial court as assignments of error under the terms of Article 40.09 V.A.C.C.P. It is clear to me, from an examination of appellant's brief, that the issue stated in the majority opinion is simply not the issue which was presented as an assignment of error and should not be the basis for the ruling of this Court.

Under the assignment of error as presented no error is reflected because we have previously ruled that even where an expert has been appointed to examine the appellant for the purpose of determining competency to stand trial that expert

may testify for the State at the punishment stage of the trial on the basis of observation made in such examination. Gholson and Ross v. State, 542 S.W.2d 395; Livingston v. State, 542 S.W.2d 655; Granviel v. State, 552 S.W.2d 107; Battie v. State, 551 S.W.2d 401; Shippy v. State, 556 S.W.2d 246.

However, even if we assume, as the majority does, that the appellant set forth as a ground of error a complaint that the trial court erred in refusing to appoint a psychologist of appellant's choice to examine appellant and present testimony at the punishment stage of the trial, I do not believe that either the law, or the record in this cause, justifies the conclusion reached by the majority.

This record reflects that on April 19, 1977 the trial court entered an order appointing Dr. Henry to examine the appellant in regard to his competency to stand trial because it had come to the attention of the court that the issue of "incompetency to stand trial" may be raised in the case. The record does not reflect who in fact suggested to the court that such an issue might be raised.

By letter of April 20, 1977 to Dr. Henry, the trial judge informed Dr. Henry of his appointment and of the type of report which was requested. An interesting inference is raised by that letter where it was noted:

> "there has been some indications [sic] that the Defendant was treated for mental problems while incarcerated in the Texas Department of Corrections. Persons who may know the facts regarding this may be obtained from the defense attorney:
>
> Hon. Bob Tarrant
> 1717 South Shepherd
> Houston, Texas
> Telephone 526-2131"

By letter dated April 24, 1977 to the trial judge, Dr. Henry reported that a psychiatric evaluation of the appellant was begun on April 21, 1977 at 9:20 a.m. Dr. Henry explained the nature and purpose of the psychiatric evaluation

to appellant and his right not to participate. The appellant indicated an agreeableness to participate. However, after 45 minutes of interview, the appellant determined that he did not want to be examined and "expressed an opinion that his attorney had not requested it." Dr. Henry then contacted appellant's attorney in Houston by telephone and his attorney also talked to appellant. At that time appellant's attorney indicated that he had not yet seen any medical data on appellant but had received a telephone report describing certain difficulty while in the Texas Department of Corrections and appellant's subsequent treatment at Rusk State Hospital.[1] By letter dated April 26, 1977, Dr. Henry reported to the trial judge that he had completed a psychiatric evaluation of appellant after a 45-minute clinical interview on April 21 followed by a 3-hour clinical interview on April 25, 1977. In this letter it was noted that on April 25, 1977 appellant continued the psychiatric evaluation after further consultation with his attorney. Dr. Henry's conclusion was that appellant was competent to stand trial.

Dr. Henry's testimony at the punishment phase of the trial, when called as a witness by the State, was objected to by appellant because the testimony exceeded the scope of the request for the examination in the trial court's original order. In stating his objection to this testimony, appellant's counsel, the same counsel who was contacted by the doctor in the course of the interview, stated that "the defendant would never have agreed to this doctor examining the defendant except for the limited purpose of determining his competency to stand trial, and the defendant and his counsel agreed to such limited purpose to determine those points, but not any

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1/ The report Dr. Henry ultimately filed stated that nothing indicated that appellant had ever in fact been confined at Rusk State Hospital.

others..."

While this record does not specifically state who suggested to the trial court that the issue of competency might be raised, it is strongly indicated by the record that the information as to appellant's history of mental problems, and the suggestion that competency might be an issue, came from the appellant's counsel. This inference is especially strong when it is noted in the court's order that the doctor should contact appellant's counsel for information concerning such past mental problems. Furthermore, the statement by appellant's counsel in his objection to the testimony of Dr. Henry suggests very strongly that the appellant may have already had some "meaningful role" in the selection of this expert witness.

Be this as it may, under the prior decisions of this Court and the authority of Article 46.02, V.A.C.C.P., the trial court had the clear authority, on its own motion, or motion by the defendant, his counsel, or the prosecuting attorney, to appoint a disinterested expert to examine the defendant with regard to his competency to stand trial. As was noted in regard to the interpretation of this statute in Granviel v. State, supra:

> "Under this statute, the trial court's allowing Dr. Holbrook to testify was proper. '[A]ppoint disinterested qualified experts to examine the defendant...' clearly means that such expert is not appointed by the court as the expert of the State or the defense, but is the court's disinterested expert. He may appoint such expert at his discretion and without a motion therefor, and either party may subpoena such witness."

552 S.W.2d 107 at 115.

From this it is clear that the legislature has provided for the authority of the trial court to appoint a disinterested expert to examine the accused and determine his competency. This Court has ruled that this expert is capable of testifying to all of the mental processes which he observed at this examination. Gholson and Ross v. State, supra; Livingston

v. State, supra; Granviel v. State, supra; Battie v. State, supra; Shippy v. State, supra.

In concluding that the indigent capital murder defendant must have equal access to expert opinion from some expert of his "reasonable choosing" the majority uses some language which, though it may be appealing to laymen, will not withstand a close examination. The majority concludes that this holding is necessary "if the scales of justice are to weigh equal regardless of wealth; and if justice is to extend as far to those who cannot afford to hire an expert as those who can; if the state is not to have exclusive access to experts; if the jury is to hear 'all possible relevant information about the individual defendant whose fate it must determine,' Jurek, supra, and not hear only those experts of the prosecutorial persuasion...."

It is utter foolishness to suggest that our system of justice can afford the indigent defendant with expert testimony to the same extent that a millionaire who is accused of crime can afford for himself. It is sheer fallacy to suggest that we can afford to allow an indigent defendant to seek examinations until he finds a psychiatrist who will testify favorably for him. It is an utter disregard of our statutory process and our prior cases to suggest that when a trial judge appoints a disinterested expert the accused is denied the opportunity to present an expert other than those "of prosecutorial persuasion."

The clear import of the majority opinion is that only the State had access in this case to expert opinion testimony concerning appellant's possible future behavior. Such a conclusion overlooks the clear application of Article 46.02 V.A.C.C.P. and the prior decisions of this Court which give the accused equal access to expert opinion when it provides him with the opportunity to ask the trial court to appoint a

disinterested expert.[2] The fact that this disinterested expert fails to find any evidence which is favorable to the accused or which he can use in his defense does not deny him the opportunity to have access to an expert opinion.[3] It appears that the majority confuses the access to expert opinion with appellant's ability to find somebody who would testify favorably.

The holding of the majority in this case is not only against the clear implication of this record which indicates that the expert was appointed at the suggestion of the appellant, and perhaps at his choosing, but is also contrary to the statutory process set up by the legislature for appointing a disinterested expert. If this Court chooses to amend the acts of the legislature so as to give the appellant a "meaningful role in the selection of the expert witness," then perhaps it should also amend it so as to provide the prosecuting attorney with a "meaningful role in the selection of the expert witness," and at the same time strike from the act the description of the expert appointed by the trial court as being "disinterested." Unless we are going to go so far as to openly amend the acts of the legislature to conform to what we think the statute should provide, we should limit

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2/ It should be pointed out that the defendant has not at any time attacked the "disinterest" of the expert appointed by the court, or even suggested that he is not disinterested.

3/ Appellant's motion requested "the appointment of a psychologist for the purpose of a mental examination."
Dr. Henry's report reveals that in addition to interviewing appellant and reviewing available medical records containing psychiatric evaluations of appellant kept by the Texas Department of Corrections, Dr. Henry administered and analyzed the following psychological examinations: Rorschach Ink Blot Projective Test; Minnesota Multiphasic Personality Inventory; Draw-A-Person Test; Bender Gestalt Test; Sentence Completion Test.
Therefore, appellant had access to the opinion of a qualified expert who was in a position to knowledgeably testify as to any matter to which a psychologist could testify.

our review of the issue that is presented to whether or not the expert appointed by the court was "disinterested"; however, such an attack has not been made here.

I cannot agree to the action of the majority in granting to either side the right to do anything but to raise an objection to the trial court's appointment of any expert as not being "disinterested." The legislature has vested the trial judge with this authority and I refuse to participate in taking it away from him, especially upon an issue that is not even assigned as error. I dissent.

VOLLERS, Judge

(Delivered: September 20, 1978)

En Banc

Judge Douglas joins in this dissent

Exhibit B

WILLIAM JACK HAMMETT, Appellant

NO. 58,453 v. --- Appeal from Brazoria County

THE STATE OF TEXAS, Appellee

OPINION ON STATE'S MOTION FOR REHEARING

Our prior opinions are withdrawn and the following opinion is substituted.

Appeal is taken from a conviction for the offense of capital murder. V.T.C.A. Penal Code, Sec. 19.03(a)(2). The jury returned an affirmative finding to each special issue submitted under Article 37.071(d), V.A.C.C.P., and accordingly punishment was assessed at death.

Mrs. Raymond Greer, the widow of the deceased, testified that on the evening of October 14, 1976, her husband returned to their home in Clute from Houston. After the evening meal she was watching TV and he was reading the newspaper. She heard a sound something like a door slamming and thought it was her husband's son, Raymond, Jr. returning. She noticed that the time was approximately 8:20. She then heard two voices. They said, "Get up, get up out of the goddamn chair, get up," over and over again. One of the men was holding a gun. She started to stand up and was thrown to the floor by her husband. She heard someone say immediately after the shooting, "Get his billfold, where is his billfold?" She then heard someone say, "Let's get out of here. Come on, let's go. Let's get out of here."

She also testified that she and her husband had a safe in their home concealed below a floor tile. After the shooting she discovered that the tile had been broken. She thought her husband was still alive and called for help. She positively identified the appellant as the man who shot her husband.

Arthur Pryor, at the time of the offense an investigator for the Clute Police Department, testified that he was called to the Greer home to investigate a possible murder. In the course of his investigation, he found several .45 caliber bullets and spent shell casings. He also located a .22 caliber bullet fragment. Through this witness numerous photographs of the scene of the crime were also introduced into evidence.

Carl Sherlock testified that his former wife's nephew, Curtis McGuffey, sold him a .45 caliber pistol for $50.00 in 1976. After a conversation with his ex-wife, Janette Sherlock, about some "difficulties she had," he called Officer J. L. Nicholson and turned the pistol over to him.

J. L. Nicholson of the Houston Police Department testified that in early 1977 he had a conversation with Carl Sherlock and that as a result of this conversation a .45 caliber pistol was turned over to him by Sherlock. Jay Evans, formerly a detective with the Harris County Sheriff's Office, testified that during January, 1977, he was participating in the investigation of the killing of Raymond Greer in Brazoria County. On January 14, 1977, he received a .45 caliber pistol from Nicholson and turned it over to the Houston "Firearms Ballistics Section."

Dr. Joseph Jachimczyk, Chief Medical Examiner for Harris County and Houston, testified that an autopsy was performed on the body of Raymond Greer on October 15, 1976. Six gunshot wounds were found and one bullet was recovered from the body. He determined the cause of death to be multiple gunshot wounds to the chest, abdomen, back, right upper extremity, and buttocks.

C. E. Anderson, a ballistics expert with the Houston Police Department, testified that the bullet recovered from Greer's body and the bullets found in the Greer home were all fired from the .45 caliber automatic which Nicholson recovered from Sherlock.

Arthur Pryor was re-called and testified outside the presence of the jury as to the circumstances of the taking of appellant's written confession. After hearing additional evidence from the appellant and considering evidence previously offered at a pre-trial motion to suppress hearing, the trial court found the confession admissible. Appellant's confession, omitting the warnings and formal portions, is set out in the appendix. When originally introduced before the jury at the guilt-innocence stage of the trial, certain extraneous matters were deleted. At the punishment phase of the trial the undeleted confession was admitted before the jury.

Janette Sherlock testified for the defense that she had been acquainted with Raymond Greer during his lifetime and intimated that he had been involved in some type of cocaine or narcotics smuggling. She admitted that she had been arrested and charged in connection with the instant offense but had been "no-billed" by the grand jury. She testified that during the time she was held in jail in connection with this offense she suffered a miscarriage. She testified that the appellant was the father of that baby. The appellant did not testify and offered no other evidence at the guilt-innocence stage of the trial.

At the punishment phase of the trial, Richard Tywater, a detective with the Harris County Sheriff's Department, testified as to the circumstances surrounding a second written statement made by the appellant while in his custody in which appellant confessed to this and other crimes. This confession, State's Exhibit 17, was then admitted into evidence. State's Exhibit 17, omitting the warnings and formal parts, is also set out in the appendix.

Dr. Bill W. Henry, an associate professor of psychiatry at the University of Texas School of Medicine in Galveston, testified

that he diagnosed the appellant as an antisocial personality type, for which there is no cure or acknowledged treatment.

The State then introduced evidence of a prior conviction for burglary of a habitation in Denton County in December of 1975. The State also introduced evidence of a conviction for driving a motor vehicle without the owner's permission and for breaking and entering a motor vehicle in 1966 and evidence of a conviction for the offense of burglary in 1969. The appellant presented no evidence at the punishment phase of the trial.

In his first ground of error, appellant contends that the trial court erred in permitting the prosecutor to inform the jurors during voir dire examination of the effect of their yes or no answers to the special issues submitted under Art. 37.071, V.A.C.C.P., at the punishment phase of the trial.

The record reflects that after the sixth juror was selected the appellant filed a motion in limine requesting the court to direct the prosecutor not to inform the prospective jurors of the effect of their yes or no answers to the special issues. The motion in limine was overruled and the court granted appellant a running objection.

In Burns v. State, 556 S.W.2d 270 (Tex.Cr.App.), cert. denied, 434 U.S. 935 (1977), relied on by the appellant, we held that reversible error was not presented when the trial court prohibited counsel for the defendant from telling the jury panel during voir dire examination the effect of a "yes" or "no" answer to the special issues submitted at the punishment stage of the trial. In Burns v. State, supra, we stated:

> "In Hovila v. State, supra [532 S.W.2d 393 (Tex.Cr. App. 1976)], while noting that the jury would know the effect of their answers to questions submitted under Article 37.071, supra, it was stated: The 'new statutes' require 'them [the jury] only to

> answer questions while the judge assesses the punishment based on such answers.'
>
> "Since it is the duty of the jury to answer the factual inquiries and the duty of the court to assess punishment based on these answers, we find no error in the court disallowing counsel to tell the jury panel the effect of their 'yes' and 'no' answers." [Emphasis supplied.]

In Battie v. State, 551 S.W.2d 401 (Tex.Cr.App. 1977), cert. denied, 434 U.S. 1041 (1978), we stated:

> "While it has been held that great latitude should be allowed a party interrogating veniremen to enable his counsel to determine the desirability of exercising on the members thereof his right of peremptory challenge, Kincaid v. State, 103 Tex.Cr.R. 485, 281 S.W. 855; Smith v. State, Tex.Cr.App., 513 S.W.2d 823, it has also been recognized by this Court that the decisions as to the propriety of any question is left to the discretion of the trial court and the only review will be for abuse of that discretion." [Emphasis supplied.]

In the instant case, we find that the question of whether the prosecutor in this case or counsel for the defendant, as in Burns v. State, supra, should be allowed to explicitly tell the prospective jurors the effect that their answers to the special issues submitted under Art. 37.071 is addressed to the sound discretion of the trial court and a case will not be reversed unless the appellant can demonstrate an abuse of the trial court's discretion. No abuse of discretion is shown in allowing the prosecutor to advise prospective jurors of the effect of their answers when, as we observed in Hovila, the jurors would already know the effect. Appellant's first ground of error is overruled.

In his second ground of error, appellant contends that the trial court erred in permitting the prosecutor "to imply to the jurors during voir dire examination that the terms 'intentionally

and knowingly' was a 'chance' or 'possibility.'" Although somewhat obscure, it appears to be appellant's contention that the prosecutor erred when attempting to explain to the prospective jurors what he understood the term "probability" to mean in the second special issue submitted under Art. 37.071. In describing the term "probability," the prosecutor on a number of occasions used the term "chance" or "possibility." Appellant refers us only to a series of pages and line numbers without further elaboration.

The record reflects that 41 prospective jurors were examined before a jury was selected. An examination of the citations to the record contained in appellant's brief reveals that he appears to be complaining about the prosecutor's comments to eight veniremen. Of these eight, one was challenged for cause by the State, four were peremptorily challenged by the appellant, and three sat on the jury. Each of the complained-of veniremen who sat on the jury was affirmatively accepted by the appellant at the conclusion of the individual voir dire. The record further reflects that at the conclusion of the voir dire the appellant had four remaining peremptory challenges and the State had ten. There is no showing that an objectionable juror sat on the jury. The appellant had sufficient remaining peremptory challenges to have removed each juror he now complains of who sat on the panel. See Payton v. State, 572 S.W.2d 677 (Tex.Cr.App. 1978). No error is shown. Appellant's second ground of error is overruled.

The appellant next contends that the trial court erred in allowing a psychiatrist who was appointed to examine the appellant with respect to his competency to stand trial to testify at the punishment phase of the trial. In the same ground of error, appellant also complains that he was denied the appointment

of a psychologist of his own choosing to testify as a defense witness.

In Gholson v. State, 542 S.W.2d 395 (Tex.Cr.App. 1976), cert. denied, 432 U.S. 911 (1977), this Court held that a psychiatrist appointed to determine a defendant's competency to stand trial could properly testify at the punishment phase of a capital case. See also Livingston v. State, 542 S.W.2d 655 (Tex.Cr.App. 1976), cert. denied, 431 U.S. 933 (1977); Chambers v. State, 568 S.W.2d 313 (Tex.Cr.App. 1978).

With respect to appellant's contention that he was denied the appointment of a psychologist of his choice, the record reflects that a written motion seeking appointment of the psycholgist was filed after the conclusion of the jury voir dire on October 14, 1977. The matter was again re-urged during the cross-examination of Dr. Henry.

On original submission this contention formed the basis of a reversal of this cause. Since such opinion was delivered, additional record as hereinafter noted has been brought before this Court. Our further review of the entire record now before us dictates the following disposition of this ground of error.

Prior to appellant filing the motion in which he requested the appointment of a psychologist of his choice at 11:00 a.m. on October 14, 1977, the following events had transpired which we deem relevant to the resolution of the issue before us.

On April 19, 1977, appellant filed his motion for commitment to a mental hospital for psychiatric testing. In such motion, defense counsel avers that he has reason to believe that appellant is afflicted with a form of mental disorder that may have destroyed his ability to perceive the wrongfulness of his conduct and that appellant "appears to be in a state at the present time that prevents him from being able to effectively assist the undersigned attorney in preparing any effective defense."

Pursuant to appellant's motion, the record reflects that an order was entered by the court on April 20, 1977, appointing Dr. B. W. Henry, an associate professor of psychiatry at the University of Texas Medical Branch in Galveston, and directing the sheriff to transport appellant

to Dr. Henry's office on April 21, 1977. No objection was voiced by appellant to the appointment of Dr. Henry.

Dr. Henry made two written reports to the trial court, one dated April 24, 1977, and the other dated April 26, 1977. It is not clear from the record before us at what point in time appellant's counsel received copies of these reports, but the record is clear that they were in counsel's possession at the time of Dr. Henry's testimony at appellant's first trial.

In the course of his April 24th report, Dr. Henry states that he telephoned appellant's attorney during his first interview with the appellant in order to obtain his assistance in having the appellant cooperate with the examination. Dr. Henry's report of April 24, 1977, contains the following summation:

> "My initial impression of William Jack Hammett, based on my incomplete clinical review with him is that Mr. Hammett has had difficulty with the law for at least eighteen years as a result of his antisocial behavior. In the interview setting he certainly conducts himself with expressions and demeanors consistent with a personality and behavior disorder primarily."

In his report on April 26, 1977, Dr. Henry states, after concluding that appellant was competent to stand trial, that:

> "The history would suggest that William Jack Hammett is a person who has possessed personality, behavioral, and characterological attributes which have resulted in repeated antisocial behavior over the past eighteen years. There is a suggestion that on one occasion in 1971 he became quite depressed and was diagnosed as having a schizophrenic reaction following a lengthy period of solitary confinement, including what is described by him as apparent sensory deprivation, which apparently, however, did not then demonstrate any delusions, hallucinations, or psychosis, according to the psychiatric report, which apparently responded shortly to a change of environment with some medication."

Trial began on April 26, 1977, and the jury found appellant guilty of capital murder on May 3, 1977. The punishment hearing began on May 4, 1977, at 9:25 a.m. and the presentment of evidence concluded at 12:05 p.m. the same day. On May 6, 1977, the court entered an order declaring a mistrial which recited, "it was altogether improbable that [they] could agree on a verdict as to special issue number three."

In a supplemental transcript filed with the Court following our opinion on original submission, it was shown that Dr. Henry submitted a bill to the court for "5/4/77 expert testimony one-half day in Angleton." This was the first notice that this Court had that Dr. Henry may have testified at the punishment hearing at the first trial. Pursuant to an order of this Court, a transcription of the testimony

of Dr. Henry at the punishment stage of the first trial has been forwarded to this Court. At such trial, Dr. Henry described in detail the tests that he had administered to appellant and his conclusion that, "His mental status revealed no indication of mental disease processes, but rather a personality structure which would be termed antisocial in type." When asked whether he had an opinion as to the probability of the appellant committing criminal acts of violence in the future, Dr. Henry stated:

> "The label attached to the personality or character structure is based on the history of such activities in a given individual. Most frequently the person suffering of an antisocial personality continues to demonstrate those behaviors in the future which have been true in the past. He described to me antisocial behaviors since age eleven, and the description has been of such activities which have led to today.... The interview and some of the statements which are on file would suggest that there has been and continues to be such preoccupations with similar kind of behavior and threats made which would make my answer yes to your question."

On August 11, 1977, it appears that the court determined appellan was indigent and the court appointed appellant's retained counsel at t first trial along with a second attorney to represent appellant.

On August 17, 1977, appellant filed a motion for continuance of the trial which had been set for August 22, 1977, and requested that additional counsel be appointed. The motion was granted and trial was reset for October 10, 1977. On August 22, 1977, a third attorney was appointed to represent appellant.

The record reflects a great number of motions were filed by appel lant on October 10, 1977, some of which related to the appointment of a psychiatrist or psychologist. On the same day voir dire examination of the jury panel began. The docket sheet reflects the twelfth juror and either accepted or voir dired at 9:00 a.m. on October 14, 1977, and the jury was recessed until 9:30 a.m. "on Monday - 10-17-77." [illegible] on October 18, and trial was con- [illegible] October 20, 1977.) The motion [illegible] appellant [illegible] psychiatrist of his own choice reflects [illegible] at 10:00 a.m. on October 14, 1977. [illegible] "Denied" and the [illegible]

reflects that Dr. Henry's testimony at the second trial from which this appeal is taken is essentially the same as that at the earlier trial.

Dr. Henry was appointed pursuant to appellant's motion on April 18, 1977, asking the court for psychiatric testing to determine if appellant knew the wrongfulness of his conduct and to determine his competency to stand trial. No objection was voiced to the appointment of Dr. Henry. Following the mistrial, appellant took no action to ask for the appointment of another psychiatrist or psychologist until after the jury selection had been completed for the second trial on October 14, 1977. In the meantime, a motion for continuance had been filed to the August setting, the request for the appointment of the retained attorney as well as two other attorneys to represent appellant was made and granted during August. Numerous other motions were filed by appellant on October 10, 1977. At no time had there been a request made by appellant pursuant to Art. 26.05(1)(d), V.A.C.C.P., for additional funds for expert testimony.

Even though appellant had been aware of the nature of Dr. Henry's testimony since May 4, 1977, he waited until after the jury had been selected for the second trial before requesting the appointment of a psychologist and then asked that the court appoint one of his choice.

Appellant in his motion did not suggest a particular psychologist nor did he make any suggestion about the fees involved, what efforts, if any, he had made in locating a psychologist, or when the psychologist would make the examination or when one could be available for testimony at trial following the examination.

We recognize that there is a distinction between the appointment of legal counsel to represent an indigent defendant and the appointment of a psychiatrist or psychologist to examine his mental state, [illegible] distinct differences in the procedures. Nevertheless, a defendant [illegible] may not manipulate his rights to obtain the appointment of experts [illegible] administration of justice. See Ex parte [illegible] [illegible] (Tex.Cr.App. 1977); Barnes v. State, [illegible] (Tex.Cr.App. 1977). Appellant [illegible] entitled to have [illegible] appointed, [illegible] appointment [illegible]

Without minimizing the desirability of providing an indigent defendant in a capital murder case with the benefit of expert psychiatric testimony, it would be unthinkable for a court to give an indigent defendant an open checkbook to use in selecting the expert of his choice.

Not only was the late hour in which appellant filed his motion calculated to be disruptive of the trial, the very nature of his motion compounded this problem. To have granted appellant's motion as it was presented and at the time it was filed would have constituted a real threat to the court's control of the trial. The granting of appellant's motion under the circumstances here presented would have allowed appellant to manipulate his asserted rights in such a manner as to obstruct the orderly administration of justice. We cannot agree that the court erred in denying appellant's motion.

Appellant's third ground of error is overruled.

In his fourth ground of error, appellant contends that the trial court erred in overruling his motion to quash the indictment.

The indictment in the instant case alleges in pertinent part that on or about October 14, 1976, the appellant:

> "did then and there intentionally and knowingly cause the death of an individual, Raymond V. Greer, by shooting him with a gun; and that the said William Jack Hammett did then and there intentionally cause the death of the said Raymond V. Greer in the course of committing and attempting to commit robbery;...."

In his motion to quash and on appeal, the appellant contends that the indictment was deficient because it did not set forth the constituent elements of the offense of robbery. The appellant specifically argues that:

> "There is no allegation of committing or attempting to commit a theft."

In Smith v. State, 540 S.W.2d 693 (Tex.Cr.App. 1976), cert. denied, 430 U.S. 922 (1977), this Court held that a capital murder indictment is not defective because the elements of robbery are not set out in the indictment charging murder during the commission or

attempted commission of a robbery. Under the new Penal Code, an indictment charging one offense during the commission of another crime need not allege the elements of the latter offense. See Gonzales v. State, 517 S.W.2d 785 (Tex.Cr.App. 1975); Watts v. State, 516 S.W.2d 414 (Tex.Cr.App. 1974).

In addition to Smith v. State, supra, this contention has been rejected in other capital murder cases. Livingston v. State, 542 S.W.2d 655 (Tex.Cr.App. 1976), cert. denied, 431 U.S. 933 (1977); Burns v. State, 556 S.W.2d 270 (Tex.Cr.App.), cert. denied, 434 U.S. 935 (1977).

Appellant's fourth ground of error is overruled.

In his fifth ground of error, appellant contends that the trial court erred "in permitting all of the evidence, State's Exhibit 1-17, because the State failed to prove the complete chain of custody of said evidence." The appellant argues that each of these exhibits was handed to the court reporter for the purpose of marking the exhibit with a number prior to its introduction into evidence and that therefore, "a part of the chain of custody of each and every exhibit is in the hands of the court reporter for a period of time...." Appellant's brief contains no citation of authority with respect to this contention.

In examining the record in the instant case, we note that State's Exhibit No. 1 is a diagram, State's Exhibit No. 2 is a .45 caliber pistol; State's Exhibits 3-13, photographs; State's Exhibits 14 and 15, spent bullet casings; and State's Exhibits 16 and 17 are written statements of the accused. Even assuming an objection was made to each of the items on the grounds now urged, it is clear that a chain of custody question was not involved. As a well-known text on evidence has observed:

> "If the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit merely on the basis of testimony that the item is the one in question and is in a substantially unchanged condition. On the other hand, if the offered evidence is of such a nature as not to be readily identifiable, or to be susceptible to alteration by tampering or contamination,

> sound exercise of the trial court's discretion may require a substantially more elaborate foundation." McCormick's Handbook on the Law of Evidence, 527, (2d ed., E. Cleary ed. 1972); see also 2 C. McCormick and R. Ray, Texas Law of Evidence, Sec. 1458 (2d ed., 1956).

An examination of the testimony given at the time each of the exhibits was admitted into evidence reveals that each was sufficiently identified. Appellant's contention that it was necessary for the court reporter to testify as to her custody of the items during the time she marked it is without merit.

Appellant's ground of error is overruled.

In his sixth ground of error, appellant contends that the trial court erred in admitting State's Exhibit Number 17 at the punishment phase of the trial. State's Exhibit Number 17 is a written confession made by the appellant to Detective Richard Tywater of the Harris County Sheriff's Department. In this confession, the appellant confessed to the murder and robbery of Greer and admitted that he was a heroin addict, had committed approximately 130 burglaries, stolen 30 cars, and committed three or four armed robberies. The appellant argues that this statement should not be admissible at the punishment phase of a capital murder trial because it was "not pertinent to any issue in this case; ... [and that it] could only be used for the purpose of inflaming the minds of the jurors." The appellant also argues that this statement was not admissible under the "extraneous offense rule." We disagree.

Article 37.071, V.A.C.C.P., provides that at the punishment phase of a capital murder trial, "Evidence may be presented as to any matter that the court deems relevant to sentence." [Emphasis added.] In construing this provision in Jurek v. State, 522 S.W.2d 938 (Tex. Cr.App. 1975), aff'd., 428 U.S. 262 (1976), we stated:

> "In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct...." [Emphasis added.]

The trial court at the punishment phase of a capital murder trial has wide discretion in admitting or excluding evidence. See Gholson and Ross v. State, 542 S.W.2d 395 (Tex.Cr.App. 1976), cert. denied, 432 U.S. 911 (1977); Livingston v. State, 542 S.W.2d 655 (Tex.Cr.App. 1976), cert. denied, 431 U.S. 933 (1977); Moore v. State, 542 S.W.2d 664 (Tex.Cr.App. 1976), cert. denied, 431 U.S. 949 (1977); Robinson v. State, 548 S.W.2d 63 (Tex.Cr.App. 1977); Brown v. State, 554 S.W.2d 677 (Tex.Cr.App. 1977); Hovila v. State, 562 S.W.2d 243 (Tex.Cr.App. 1978), cert. denied, ___ U.S. ___ (Jan. 22, 1979); Wilder and Armour v. State, ___ S.W.2d ___ (No. 57,848, 1-31-79).

In upholding the constitutionality of the Texas death penalty procedures, the United States Supreme Court noted:

> "Texas law requires that if a defendant has been convicted of a capital offense, the trial court must conduct a separate sentencing proceeding before the same jury that tried the issue of guilt. Any relevant evidence may be introduced at this proceeding.... The Texas capital sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death.... What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced." [Emphasis added.]

Jurek v. Texas, 428 U.S. 262 (1976).

Nothing in Art. 37.071, supra, requires that there be a final conviction for an extraneous offense to be admissible at the punishment phase of the trial. Evidence of other crimes contained in appellant's confession to Detective Tywater clearly falls within the range of "prior criminal conduct." Such "prior criminal conduct" is clearly relevant to the jury's deliberation on the special issues submitted to it at the punishment phase of a capital murder trial. Appellant's admission of his "prior criminal conduct" is probative evidence that may be brought before a jury at the punishment phase of a capital murder trial. The trial court did not err in admitting State's Exhibit Number 17. Appellant's sixth ground of error is overruled.

In ground of error number seven, appellant contends that the trial court erred in admitting State's Exhibits 3 through 13 because they were not properly identified. The record reflects that State's Exhibits 3 through 13 consist of photographs of the scene of the crime. They were admitted through the testimony of Arthur Pryor, who at the time of the offense was an investigator with the Clute Police Department. Appellant contends that since Pryor never testified that he was the one who took the pictures, they were inadmissible.

The record reflects that Pryor testified that each of the photographs fairly and accurately portrayed the scene at the time of his investigation.

In David v. State, 453 S.W.2d 172 (Tex.Cr.App. 1970), this Court, quoting from C. McCormick & R. Ray, Texas Law of Evidence, Sec. 1465, 2d ed., 1956, stated:

> "Whenever a photograph portrays any facts relevant to an issue in the case it is admissible in evidence provided it is first verified by a witness as being a correct representation of such fact.
>
> "This verifying witness need not be the photographer nor need he have any knowledge concerning the taking of the picture. What is essential is that he knows the scene or object involved and be able to state that the photograph correctly represents the facts...."

See Lanham v. State, 474 S.W.2d 197 (Tex.Cr.App. 1972); Martin v. State, 475 S.W.2d 265 (Tex.Cr.App. 1972); Villarreal v. State, 547 S.W.2d 281 (Tex.Cr.App. 1977); see also McCormick's Handbook on the Law of Evidence, Section 214 (E. Cleary ed. 1972).

It is clear that the photographs were properly verified by the witness as accurately portraying the depicted scene. Appellant's contention that they were inadmissible because the photographer did not testify is without merit.

In his eighth ground of error, appellant contends that the trial court erred in admitting into evidence State's Exhibits 19, 20, and 21 at the punishment phase of the trial. State's Exhibit Number 19 consists of a penitentiary packet from the Texas Department of Corrections containing a judgment, sentence, and order

of commitment in Cause No. 11,965, wherein the appellant was convicted of the offense of driving a motor vehicle without the owner's permission, and a conviction in Cause No. 11,966, wherein appellant was convicted of burglary of an automobile. In addition, the pen packet contains the fingerprints and photographs of a William Jack Hammett. State's Exhibit Number 20 is also a penitentiary packet from the Texas Department of Corrections containing a judgment, sentence, and order of commitment in Cause No. 12,518, wherein William Jack Hammett was convicted of the offense of burglary in Denton County in 1969. The penitentiary packet also contains fingerprints and photographs. State's Exhibit No. 21 consists of the Brazoria County Jail fingerprint card maintained on William Jack Hammett.

Paul R. Wishman, a Brazoria County deputy sheriff, was qualified as a fingerprint expert. Outside the presence of the jury, the trial court ordered the fingerprints of the appellant to be taken by Wishman. The appellant refused the court's order and would not allow his fingerprints to be taken. After returning to the courtroom, State's Exhibit No. 21 was identified as a fingerprint card used in the identification section of the Brazoria County Sheriff's office. The witness testified that he had personal custody of the fingerprint card and that it was kept in the usual course of business in the Sheriff's office. Wishman testified that the fingerprint card revealed that the fingerprints of William Jack Hammett were taken by Captain Judy Roex and that these cards were made on each person as he was booked into jail. Wishman identified the appellant as William Jack Hammett. Wishman also testified that the fingerprints on State's Exhibit Number 21 were the same as the fingerprints contained in State's Exhibits Nos. 19 and 20.

Appellant contends that since Wishman did not personally take the fingerprints in State's Exhibit No. 21 they were hearsay and that therefore both State's Exhibit 21 and the pen packets in State's

Exhibits 19 and 20 should not have been admitted. In Jones v. State, 500 S.W.2d 661 (Tex.Cr.App. 1973), this Court held that a fingerprint expert could properly compare defendant's fingerprints taken from "an original jail card" made up when a named person was incarcerated in the county jail and compare those prints with other records to prove up the admissibility of other final convictions. The Court specifically noted that it was not necessary for the fingerprint expert to have made the known prints himself to authenticate them. See also Tatum v. State, 505 S.W.2d 548 (Tex.Cr.App. 1974); Bullard v. State, 548 S.W.2d 13 (Tex.Cr.App. 1977).

The State sufficiently proved that the appellant was the same William Jack Hammett whose prior convictions were reflected in State's Exhibits 19 and 20. Appellant's eighth ground of error is overruled.

In his ninth ground of error, appellant contends that the trial court erred in admitting State's Exhibit No. 2, a .45 caliber pistol, because a "complete chain of custody had not been proved." Appellant's contention is grounded on the fact that Carl Sherlock could not positively identify State's Exhibit No. 2 as being the same pistol he received from Curtis McGuffey in 1976. When asked if he could identify State's Exhibit No. 2, Sherlock testified, "Well, it looks like it but I have no way of knowing. I mean I never did mark the gun or nothing." J. L. Nicholson of the Houston Police Department testified that State's Exhibit No. 2 was the pistol he received from Carl Sherlock. He noted that at the time he received the weapon he scratched the initials "J.L.N." on the weapon and that State's Exhibit No. 2 contained this marking. The record also reflects that C. E. Anderson, a ballistics expert, testified that a bullet found in the deceased's body matched a bullet fired from State's Exhibit No. 2. On the basis of these facts, we find that State's Exhibit No. 2 was sufficiently identified. Appellant's ninth ground of error is overruled.

In his tenth ground of error, appellant contends that his written confession, State's Exhibit No. 16, given to Officer Pryor, was involuntary.

The appellant argues in his brief that his confession was involuntary as a matter of law because he "was led to believe that his girl friend would be set free if he gave a statement. That such a belief, from these facts, shows that the confession by the defendant was made with compulsion and persuasion so as to get his girl friend set free from jail and from the capital murder charge at a time when she was in dire need of medical assistance due to her miscarriage while in jail."

The record reflects the following events surrounding the taking of appellant's written confession, State's Exhibit Number 16. The appellant was apparently arrested in Robertson County on January 19, 1977. On January 20, 1977, law enforcement personnel from Clute traveled to Robertson County and attempted to interview the appellant after he was advised of his rights by Lieutenant Argo and had been taken before a magistrate in Robertson County. Later that day, appellant was transferred from the Robertson County Jail to the Brazos County Jail. Late in the evening of January 22, the appellant was transferred from the Brazos County Jail to Brazoria County. On Sunday, January 23, he was again advised of his rights by a magistrate in Brazoria County. On Tuesday, January 25, a meeting took place between the appellant and the Brazoria County district attorney. The next day the appellant's girl friend, Janette Sherlock, and her attorney, Louis Andrews, met with the Brazoria County district attorney at Andrews' request. At this time, Sherlock was being held without bond on a charge of capital murder in connection with the instant offense. After evaluating the case with her counsel, the prosecutor agreed to set bond in the amount of $2,500 on the condition that Sherlock give a written statement to the authorities with respect to the instant offense. The record is unclear as to whether a statement was ever given by Sherlock. Although there is a conflict in the testimony, apparently at the request of Sherlock, the district attorney agreed to allow her to

meet with the appellant. Sherlock and Andrews then met with the appellant at the Brazoria County Jail in a conference room. The appellant was advised by Sherlock as to her current medical condition since she had recently suffered a miscarriage. She also advised the appellant that she was being released on bond. According to Andrews, there was no discussion of any "deal" that the appellant would make a written statement in exchange for Sherlock's release on bond.

Sherlock and the appellant both testified that Sherlock's release on bond was in exchange for the appellant giving the authorities a written confession as to his participation in the robbery and murder of Raymond Greer. The prosecutor emphatically denied any such agreement and was supported by the testimony of Louis Andrews, Sherlock's attorney, who was also present. Later that afternoon and early in the evening, the appellant gave a detailed written statement, which was admitted as State's Exhibit Number 16. It is undisputed that the proper warnings and formalities required by Art. 38.22, V.A.C.C.P., and the United States Constitution were fully complied with. Appellant's only contention is that the confession was not voluntary because it was improperly induced by the alleged "deal" with respect to Sherlock's release on bond. On the basis of the conflicting evidence, the trial court found, and we find, that the evidence supports the court's finding that the confession was freely and voluntarily given. See Roberts v. State, 545 S.W.2d 157 (Tex.Cr.App. 1977); cf. United States v. Robertson, 582 F.2d 1356 (5th Cir., 1978) (en banc).

Appellant's tenth ground of error is overruled.

In his eleventh ground of error, appellant contends that the trial court erred in overruling his objection to the argument of the prosecuting attorney when he allegedly testified to matters outside the record.

The record reflects the following argument occurred at the guilt-innocence stage of the trial:

> "MR. OGDEN BASS: ... Now another old trick that I have seen around, and I guess if I was on the other side I would do it too because we are adversaries. You get a witness and you try to make a point. 'Well, now, those boat parts, have you got any receipts? A Yes, I think so. Q You got some receipts? A Yes, I think so. Q Well, go down at the noon recess,' sometime 'and bring them back.' Okay, that leaves in the mind she is going to go get them and bring them back. Doesn't it leave that in your mind? It also leaves in my mind if she brings them back he is going to put her on the stand. He asked the question. He asked her to do it. Put her on the stand and ask about them, if she don't bring them back. You know darn well she is going to. But, you know, she went there and she brought them back."

The appellant objected on the grounds that the prosecutor was testifying to matters outside the record. His objection was overruled and his motion for mistrial was denied.

The record reflects the following occurred during the cross-examination of Mrs. Raymond Greer:

"BY MR. SAM BASS [defense counsel]:

"Q Were you there when they were delivered?

"A Yes. I got the receipts for them.

"Q Were you there when they were delivered?

"A I don't recall if I was in my office or out in the yard when they were delivered, but I was around there somewhere.

"Q Who brought those parts down there?

"A I don't recall the name.

"Q What is the name of the company?

"A I don't recall the name.

"Q What is the name of the man?

"A I don't recall the name.

"Q What is the name? Can you find it out when you leave here at recess?

"A There are receipts in the office. Of course I can.

"Q You can find out and bring us receipts showing when they brought the boat parts, what kind, and who delivered them?

"A Yes.

"Q Could you do that at the noon recess?

"A Of course I can do that.

"Q I would appreciate it if you would...."

The record reflects the following during the appellant's opening argument at the guilt-innocence phase of the trial:

> "MR. TARRANT [defense counsel]: Under our system I am going to sit down now and I don't get to talk to you any more, but before I sit down I would like to say something about one person and that is the testimony of Mrs. Greer. That delivery that was supposed to come out there that night was with some dope. Did you hear anybody put her on the witness stand to substantiate there was boat parts delivered? Did you see any evidence that that boat parts delivery actually happened at all? No, you didn't hear anything like that."

It is clear from appellant's cross-examination of the witness Greer and his opening argument that the complained-of argument by the State was both a reasonable deduction from the evidence and invited by the argument of appellant. Antwine v. State, 572 S.W.2d 541 (Tex.Cr.App. 1978); Laws v. State, 533 S.W.2d 6 (Tex.Cr.App. 1976); Mayberry v. State, 532 S.W.2d 80 (Tex.Cr.App. 1976).

Appellant's eleventh ground of error is overruled.

In his twelfth ground of error, appellant contends that the trial court's charge at the guilt-innocence phase of the trial was fundamentally defective because the court charged "intentionally or knowingly" while the indictment reads "intentionally and knowingly."

In Cowan v. State, 562 S.W.2d 236 (Tex.Cr.App. 1978), this Court rejected a similar contention in the face of a specific objection to the use of the word "or" instead of the word "and" between the word "intentionally" and the word "knowingly" in the charge. See also Mott v. State, 543 S.W.2d 623 (Tex.Cr.App. 1976); Moreno v. State, 541 S.W.2d 170 (Tex.Cr.App. 1976); Garcia v. State, 537 S.W.2d 930 (Tex.Cr.App. 1976); McElroy v. State, 528 S.W.2d 831 (Tex.Cr. App. 1975).

Appellant's twelfth ground of error is overruled.

In his thirteenth and final ground of error, appellant contends that the capital murder provisions of the Texas Penal Code are unconstitutional because the caption to House Bill No. 200, "An act relating to the punishment for murder under certain circumstances and conditions," was violative of Art. 3, Sec. 35, of the Texas Constitution.

This precise contention has been previously rejected by this Court. Smith v. State, 540 S.W.2d 693 (Tex.Cr.App. 1976), cert. denied, 430 U.S. 922 (1977); Burns v. State, 556 S.W.2d 270 (Tex. Cr.App.), cert. denied, 434 U.S. 935 (1977).

Appellant's thirteenth ground of error is overruled.

The State's motion for rehearing is granted, and the judgment is affirmed.

TOM G. DAVIS, Judge

(Delivered February 28, 1979)

En Banc

STATE'S EXHIBIT #16

"I have known James Richardson since about May or June of last year. I met him at a friend's house. I don't remember the friend's name.

"I met Curtis McGuffey in June or July of last year. I met him at a friend's house. The friend's name is Jimmy D. Smith.

"I met Janette Sherlock at Jimmy D. Smith's house in September of last year.

"Me and Richardson went to Las Vegas and bar[illegible] out there about a week, and then went on to Los Angeles and did a hijacking out there and made some money and came back to Texas. Me and Richardson and McGuffey did three or four hijackings in Harris County.

"Richardson doesn't do drugs, but me and McGuffey do. McGuffey does THC and I do heroin. We did these hijackings to get money to buy drugs and live on.

"We were on a hijacking on October 14, 1976, at about one or two in the afternoon. We remembered this guy and his son who have an upholstery shop on Warner. We bought some tape at a TG&Y store on Cavalcade in Houston. It was black electrical tape. We were going to tie the guy up with it. We didn't get but four dollars off him. We took Curtis home to Janette's house on Bissonett, and then we went to a jewelry store to case it.

"Then we came back to Janette's apartment to get Curtis and to show him the jewelry store on Lawnpoint. Curtis didn't like it. He got to telling us about Raymond Greer. He said that Mary had told him that Raymond had four pounds of coke and twenty-five thousand dollars in cash at his house. She was Raymond's chip or mistress. Curtis was her ex-husband and he also chipped with her, too.

"I asked him where Raymond lived. He said he didn't know, but it was in the phone book. I said alright, and we went back to Janette's apartment at about five or six o'clock.

"Me and Janette and Curtiss and Richardson and Cindy, Curtis's wife were there at the apartment. While we were thre, me and Curtiss went to the bathroom or to their kids' room and discussed it. About an hour before dark, we told Janette we were going to Goofy's Pool Hall. We left in a stolen car. I had dope on me. I had a fix before we left. Janette lives in a complex of about five hundred units and the car we left in was parked close to it. The car was a 1974 Mercury Marquis, red with white upholstery and bucket seats. I had stolen it off the Dodge House on the Southwest Freeway.

"McGuffey drove, I sat on the right hand driver's side and Richardson was in the back. I had the guns with me. One was a .45 Colt automatic and the other one was a .32 Beretta automatic. I had traded dope for both of them. I had only had them about a week, no longer than that. I had them locked in the glove box in the car. I didn't hand Richardson a gun until we got to Clute. We got on the Southwest Freeway to 288, took a right and headed that way. We stopped at a liquor store that was pink on the outside and had a large gravel parking lot. I don't remember the name of the liquor store. McGuffey got out and went in the liquor store and asked someone where Clute was. He came back outside and got in the car and said that Clute was on the other side of Angleton.

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"We stopped at a convenience store. I can't describe it, but it was on the the [sic] driver's side of the road. We asked where Plantation Road was. Then we went on down 288, past Plantation Road to a cafe with a supermarket on the right hand side of it. McGuffey used the telephone there in front of the supermarket to call Raymond's house to see if he was there. Raymond wasn't there, and a woman had answered the phone. We went to the cafe by the supermarket and ate a hamburger and had a coke, and I went into the restroom and fixed some more heroin.

"Then we went to Raymond's house. McGuffey drove us there and let us out on the corner. There were four cars parked in the front. To the left was a bunch of little trailers and his office. To the right was a building and an alley, and a bar. Me and Richardson walked around to the wrecking yard. No, that's not right, first McGuffey drove us down to a convenience store on the Corner of Plantation Road and 288. From there, me and Richardson walked down the street to the wrecking yard. I walked around the house and jumped over the fence, no, I opened the gate on the fence and walked into the yard. I could see into the house by looking over a swimming pool and through plate glass windows. I could see at least four people in the house, maybe more. I think there were maybe two men and two women, I'm not really sure.

"I decided there were too many people there at that time, and we walked back down to 288. I don't remember what all Richardson and I talked about while we were walking back to the convenience store, but I do remember saying that there were too many people there now, or something to that effect. We decided to kill some time.

"We drove to a bar on Plantation on the corner from Greer's. I don't remember the name of the bar, but it was little and dinky, and was facing Plantation. McGuffey and Richardson got out and went into the bar to drink some beer and shoot pool. I went down to case Greer's house. I was gone approximately fifteen minutes. I walked around his house and opened the gate in the fence and looked in and saw just a man and a woman sitting in a chair looking at television.

"I went back and told them there were just two people at the house, and that two of the cars were gone. Then I told them, 'Let's go get them.'

"We drove to the bar beside Raymond's house, I don't know what the bar looked like. It was a frame building, I believe. I told Curtiss to go in the bar for a drink and to leave the keys in the ignition, and that when we came back, we would honk the horn. I don't know what time this was, but it was after dark.

"I had given Richardson the gun at the convenience store. After I told Curtiss to go get a beer, I said, 'Let's do it.' I had the .45 and Richardson had the .32 which I had given him.

"Our original plan was to knock on the door and to tell whoever answered it, that we needed a wrecker, that our car was in the ditch, or something. I knew that if we could get them to open the door, we would have an easier entry. But when We tried to open the door, it was unlocked. I went in the door first. I knew where Greer and his wife were, because I had seen them through the window when I was there before. They were sitting

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with their back to us in a big black chair. He was sitting to the right side of the chair with his arm around his wife.

"I ran in first and ran in front of him to the left side of him. Richardson was directly behind him. We both had guns on him. I told him, 'On the floor, m----- f-----.'

"His wife screamed. Greer said, 'What is this, man?' I said, 'This is a robbery, man.' He said, 'What?' I said, 'It's robbery, get on the floor.' I may have said this a couple of times. Greer's wife was screaming and fell to the floor.

"RIchardson kicked the back of Greer's chair real hard with his knees. When he did that, Greer came up with a pistol. It was a revolver. I thought at the time that it was a .38, but I heard later that it was a .22. It had black and white bone handles. He came up and fired a shot at me from the distance of approximately five feet. When I saw the gun come up, I fell directly back on to the couch. I heard the shot fired. I don't know if Greer shot first or Richardson, one of them shot. I heard only one shot. I thought he had shot me and that I just couldn't feel it, and so I shot him six times. I think I had seven bullets in the gun, but I know I shot him six times from the distance of about six or seven feet. I fired four of the shots from the couch and then I stood up. Greer was slumped down in the chair. His face was in the chair and his body was in the floor. This was after I had shot him four or five times. I believe I shot him three times while I was standing over him.

"By this time, Greer was laying on the floor. I was going to choke him. I reached down for his throat and Richardson grabbed me. I reached for a gold chain that Greer had around his neck. I dropped the .45 when I went down to choke him with both hands. Richardson grabbed me and said, 'Come on man, let's go.' I started to reach for his gun and drew back and then reached and drew back again. And then I reached and got my gun. Greer was laying flat on the floor, face up, diagonally to the chair. His wife was on the floor directly behind me. I thought about shooting her. I don't know why I didn't. It wasn't because I was afraid of her or anything. I felt like I needed to get out of there. I don't think she saw me. When I last saw her, she was laying face down on the floor. She was screaming and moaning. I don't know why I didn't shoot her.

"Richardson was gone and I started toward the door. I went halfway to the door and turned and went back. She was crawling toward Greer and moaning. I didn't say anything to her. I thought of shooting her but blew it off. I closed the door behind me and ran through the gate in the front yard.

"Richardson was sitting in the back seat of the car on the passenger side, when I got there. I got into the front of the car on the driver's side. I honked the horn five or six times before Curtis came out. He got into the car in the front on the passenger's side.

"I drove down to the corner first and took a left and then took another left at the next street. It was a dead end and I took another left and then right onto Plantation Road. Then left onto 288 and went toward Angleton. We did not stop, and went on toward Alvin. About two miles south of Alvin, we took a

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road to the left. I thought I was taking a short cut, but we ended up in Rosharon and back on to 288.

"The guns didn't change hands during this time. Mine was under the front seat. I don't know where Richardson's was. I told Curtis that we had to kill Greer, that he had come up firing and we had to shoot him. I told him not to tell anyone about this. I told them we had to keep cool, and not get busted.

"I was plotting on both of them right then, but I wasn't going to waste them right then because too many people had seen us leaving the apartment together. Richardson and McGuffey were real sick. We went back to Houston and stopped at a Texaco station at the intersection of 288 and 610. I got five dollars worth of gas and paid cash for it. We all got out and went to the bathroom. Richardson was real sick and had to throw up. We got back into the car and went to Jannette's house.

"Janette wasn't there when we got there. There was just me and Curtis and Richardson and Cindy and another girl named Kim. The kids were with Jannette. She had to take her ex-husband home because he was drunk or something. We were there about an hour or an hour and a half before she got back.

"I had blood all over my hands and clothes. I took a shower and washed real good to get the blood off. I changed my clothes. I told Cindy that we had to kill Greer. She didn't cry or nothing, but she wasn't too happy about it. I told her not to say anything about it.

"She put my bloody clothes in a plastic bag, the clear sandwich baggy type, and I think I tied up the end of the bag with a wire garbage type tier [sic]. Then she took the clothes in the bag and went to another apartment complex and threw the clothes into a dumpster.

"This was before Jannette came home. Then she came home with the two kids and I called her into a back room and told her that I had to kill a man tonight. She said, 'What is his name?' I told her it was Raymond Greer. She got real upset about it. She was worried about me. I told her everything that happened, how it went down.

"McGuffey and Cindy took Richardson home. I believe Kim went with them.

"I had got the gun from Richardson while we were still in the car. I took them into the house and put them some water in the sink to get the fingerprints off them, put them in a plastic bag, and put them under the bed in Jannette's bedroom.

"Then everybody came back and spent the night except for Richardson. The next morning we got up and I got the guns and told them I was going to throw them away (everybody except Kay and the two boys). Curtis said he knew of a good place to get rid of a gun. I gave him the .45 and I kept the .32.

"I left by myself and drove on highway 59 almost to Porter. I stopped at a bridge at a river. I threw the gun on the East side, or on the Houston side, of the river. I threw it into the water about thirty yards from the bank. The gun was still wrapped in the plastic bag, and I can show you where I threw it.

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"I went back to the apartment, and I think the same people were still there. I got rid of the car that night at a place over there off of Cavalcade, not too far from where Ipulled the armed robbery. I pulled the tires off of it, but I left the original plates on it.

"I have been doing heroin since last March. At that time I had about a two hundred dollar a day habit. I was supporting it by burglaries and car thefts. I would get rid of the stuff through a fence.

"The girls were going back to Louisiana, and I told them that if anybody said anything about what had happened, that me or Kenny Green would take care of them. I was planning on wasting McGuffey, and told Janette about it. She started crying and said that she had raised him, and please don't do it. I was also planning on wasting Richardson, but he was arrested and put in the Harris County Rehab. I had asked him about twenty times if he had got rid of the .45. He told me that he had thrown it in a pond. Then finally, he told me that he had sold it to Janette's ex-husband, Red.

"The night before Curtis got busted, I was real messed up. This was into the night and Curtis was on THC. Some people came in and told me that Janette was in for Capital Murder, and that Red had Curtis' gun. I asked Curtis if he had sold the gun to Red, and he said, 'Yeah.' When he said that, I hit him in the eye. I started going for my pistol (a 9 mm Browning). Some people grabbed me, and were telling me not to kill him. They got me out of there and we left.

"I went over to Kenny Green's house on Tuesday, January 18, 1977, and he told me that the Texas Rangers and Police Department had been there the night before, hunting for me for Capital Murder.

"Kenny Green is married to my first cousin, Judy Green.

"I had gone over to their house to score some heroin. He had about two or three ounces of heroin and then asked me if I wanted to go to Hearn with him. He said he knew these two girls who were living with this trick who had two hundred thousand dollars and would buy all the dope you wanted. He took me there and left me. I spent the night and left the next day."

STATE'S EXHIBIT #17

"My full name is WILLIAM JACK HAMMETT and I am a white male, 29 years of age. My date of birth 6-7-47. My home address is 5500 Antonie #155 and I live there with Jeannette Sherlock. My phone number there is 686-1364. I am presently unemployed.

"I met Curtis McGuffie at a Friend by the name of Jimmy D. Smith who lives at the address on Sunny side in June of 1976. I met James Alton Richardson about the same time.

"I began this criminal episode in April of 1976, which consisted of car theft, burglary, armed robbery, and ended with a murder in Bazoria [sic] County. I am a heroin addict and between

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April of 1976 and January, 1977 I committed approximately 130 burglaries and stole approximately 30 cars. I committed three armed robberies, one aggravated robbery and committed one murder to support my habit, my herion [sic] habit.

"THe reason I am making this statement is to clear everything because I feel that if i [sic] cooperate it would go easier with me and to get the pressure off my mind and to make things easier for me.

"In March 1976, I came from San Deigo [sic] California to Houston, Texas and moved in with Kenny Green who resided at 115 Havner. While living with Kenny Green, who is a herion [sic] addict I began to use herion [sic] and developed a habit. In April 1976 I came [sic] dependent upon heroin and did not have the money to support my habit which at this time I was shooting 3 to 4 papers a day, about $150.00 a day habit. I pulled approximately 7 or 8 burglaries in April and stole approximately 3 cars. At this time I was working strickly [sic] by myself. As my habit became stronger, I began to steal more. In May 1976 I committed several burglaries and several car thefts. I don't know how many. I worked mostly in North Harris County and the Northern part of the city. I usually gained entry through a back window or a back door which ever was easier. I mostly stole color TV's, buns, silver ware, meat, jewerly [sic], and cash. Anything of value that I could sell to a fence or trade for heroin.

"In June 1976 I met Curtis McGuffie. At first McGuffie only set people up for me to burglaries [sic] their homes. He set several of his friends up for me and helped me dispose of a lot of the merchandise. After setting up several burglaries for me he asked me if I needed anyone to help me. I told him yes and then him and I began to commit burglaries. We mostly worked out of North Harris County. He helped me steal several cars in the month of June. We would ride around in the country until we saw a house that looked like no one was home. McGuffie would always go to the door and knock to see if anyone was there. If no one was there, we would park our car down the street or in the next block and walk back to the house and make entry through the back. Then One of us would go back for the car, then he would back into the drive way and we would load the car. I meant to say that we would pile up the merchandise at the front door or the garage. We continued to pull these burglaries and steal these cars on up unitl [sic] the month of July. One day we were out burglarizing, and we stopped at a cafe to eat lunch in Porter Texas. I believe the name of the place was Bill's Steak house and Bar BQ. It is a frame building. There is a trailer house where the owner and manager lives right next door. While we were eating, I made the statement out loud, 'I wonder what he does with the money at night'. We discussed this and decided to come back that night which was July 16, 1976 and watched to see what he did with the money. After all the customers had left we watched (i [sic] mean) we snuck up to the window and watched the manager count the money and put it in a brief case which we could see already had money in it from the previous nights receipts. We deceided [sic] to go back the next night and robb [sic] him. On July 17, 1976, me and Curtis McGuffie, went back to the Steak house to rob him. We parked our car which was a hot car. We parked across the street in the woods. We walked across the street in a field and waited until everyone of the customers had left. I went to the window and watched him

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count his receipts. Then we watched him and a woman and a man about 17 years old and a little girl about five years old go into the trailer house with the brief case. Curtis then went to the door and knocked, the owner opened the door and Curtis asked him if he remembered him. The man said no and Curtis told him that he had run out of gas down the street and would he carry him to get some. I was hidding [sic] out of site [sic] beside the trailer with a sawed off, Ithica shot gun. I came out of hiding and ran up the steps with the shot gun and Curtis pulled out his pistol which I believed was a 357 magnum and I hollared [sic] everybody on the floor. The little girl began to scream and I told her to get on the floor that I wasn't going to hurt her. Everyone got on the floor and McGuffie kept them covered with the gun while I taped their hands. I ran out of tape so I cut some lamp cords and tied the feet, with these. I tied everyone up except the little girl. I asked the owner where his money was and he said in my billfold. I got his billfold and there was approximately $150.00 cash in it. I asked him (I mean I told him) the real money, the brief case. Curtis told him that he would Blow his head off if he didn't tell us. He told us the brief case was in the hall closet. I looked in the closet and found the brief case. McGuffie kept telling them that he was going to waste them if any body tried anything and I kept telling them no one would get hurt if they did what we asked. As we started to leave I started to take a ring off the owners finger and he told me that it belonged to his father and grandfather and please don't take it becasue [sic] it meant a lot to him and I told him okay that I understood, that I had a lot of things that I would not part with either so we left, got into our car and went back to Houston. We got approximately $3800.00, my part was $2100.00. With my money I bought a half ounce of heroin which cost $400.00. I bought probably $400.00 worth clothing for myself and approximately $400.00 of clothing for my girlfriend. The rest I bought dope with. Four days later I was broke again and began, to steal again. I also understand at about this time McGuffie was broke again too. I kept on stealing up until the middle of August and at this time went to Denton County to kick my dope habit. I was gone approximately one month and then came back to Houston.

"I met Jimmy Richardson again at this time and started pulling burglaries with him. I also stole cars with him, for two weeks I worked with Richardson and then went to Las Vegas partying, then we went to California (los Angles [sic]) and committed armed robery [sic] in Orange county. We came back to Houston around the first of October and pulled a few more burglaries together.

"I met McGuffie again at this time, and me and him and Richardson began to work together. On October 14, 1976 we went to Clute Texas (Barozia [sic] County) to pull a robbery and killed a man while committing this robbery. Richardson was arrested three days later and sent to the rehab so me and McGuffie began to work together. We pulled numerous burglaries on up until November. At the end of October, about the 21st me and McGuffie were committing burglaries on Frick Road. We left our car parked and climbed over a fence. The car we used was a 75 or 76 Ford Elite, blue with white vynil [sic] top. I stole this car

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from Charlie Hall Ford (I believe) on Little York. Some construction men saw us burglarizing the house on Frick Road. When we came out of the addition we saw all the men gathering around our car. We split up, I began walking away from the car and McGuffie began walking toward the car. A man pulled up beside me and stopped the car and pulled out a gun and told me to walk back toward our car. As I was walking back toward the car I saw a man run across the road and fall in a ditch. Then I saw a red or maroon Chevrolet coming toward me at a high rate of speed. The car stopped and McGuffie was driving it. The man that had told me to walk back stopped beside McGuffie and McGuffie pointed his pistol at the man while I got into the car. We then sped off. McGuffie later told me that the man had told him that they had seen us burglarizing the house. McGuffie asked him 'are you sure' and they said yes. He said that in that case hit the gound [sic] and pulled out his pistol. Then he took one of the men's car and came and got me. We went home. I can't remember if it were a day or two later that me and another person that I am not going to mention robbed a supermarket on Fulton St. I abandoned the car at an apartment complex which was the car that I had stolen on Frick Road. Me and McGuffie kept on working together up until December when I met a man who had some real estate keys that which was keys to lock boxes. These are used to keep the keys of real estate customers homes. The lock boxes hung on the front door containing the homer owners keys. The keys had open all lock boxes on all homes. This is how I gained entry to the homes. I used these keys on approximately 50 burglaries. Then I heard through street talk that they were hunting me for the murder in Clute Texas. I got scared and threw away the keys on Hwy 290.

"When I knew that the Harris County Sheriff's Office were getting close to catching me I left and went to Robinson County, Hern [sic] Texas and was arrested there by the Sheriff. The next day Officers from Clute Texas and Officer Tywater from Harris County came down and talked to me, at which time they served a murder warrant from Bazoria [sic] County. After being brought back from Bazoria [sic] County, I deceided [sic] to cooperate with the Harris County officials.

"Officer Argo and Officer Pryer of Clute Texas talked to me and I told them that I wanted to go to Harris County and get my business straight. On Monday, January 31, 1977 Mr. Argo and Pryer brought me to Harris County and put me into the custody of Det. Tywater and he took me before a magistrate, Judge Pacitte were [sic] I was advised of my rights. I told Detective Tywater about the burglaries and robberies and car thefts and offered to show him the locations and the way that I made entry and how I disposed of the property. I rode with Det. Tywater and Detective Price and pointed out the locations in North Harris County and in West Harris County that I had burglarized. I also explained how I had gained entry into the residence and told them who was implicated with me, in these burglaries. The officers copied addresses and spoke with the people. I beleived [sic] that there were about 75 burglaries I committed in Harris County and probable 30 more in the city of Houston. I stole approximately 30 cars and committed 3 or 4 armed robberies in Harris County.

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"I disposed of the property through fences that I knew and dealt with. I gave Mr. Tywater the names of 2 or 3 fences but will not name them in this statement. Most of the property is gone and can never be recovered, I believe.

"I was not threatened, corhersed [sic] or made any deals and I made this statement strickly [sic] on my own with no advisement from anyone. I did not wish to have counsel by attorney and I am guilty of these crimes and I am admitting them."

WILLIAM JACK HAMMETT, Appellant

NO. 58,453 vs. - - - - Appeal from BRAZORIA County

THE STATE OF TEXAS, Appellee

CONCURRING OPINION ON
STATE'S MOTION FOR REHEARING

I concur in the decision to grant the state's motion for rehearing on the basis of records that were not before this Court on original consideration of this appeal, but which have now been presented by supplemental records, regarding appellant's failure to pursue his right to a defensive psychological expert witness in a timely and diligent fashion. By addressing that issue in those terms, however, the majority has not departed from its fundamental holding on original submission, in which this Court recognized the right of an indigent capital murder defendant to the appointment of an expert witness on the future conduct issue of Article 37.071, V.A.C.C.P. That right was acknowledged to rest on these considerations:

Those who face an accusation of being likely to commit criminal acts of violence that will constitute a continuing threat to society face a peculiarly unique charge with ominous consequences. In this jurisdiction the use of the expert opinion testimony of those in the behavioral sciences has frequently been resorted to by the prosecution, and this Court has consistently approved such use, often basing the sufficiency of the evidence to support a death-producing verdict on that evidence. See, e.g., Franklin v. State, ____S.W.2d____ (5/24/78, #57,348); Chambers v. State, ___S.W.2d___, (5/24/78, #54,676); Hughes v. State, 562 S.W.2d 857; Shippy v. State, 556 S.W.2d 264; Granviel v. State, 552 S.W.2d 107; Battie v. State, 551 S.W.2d 401; Collins v. State, 548 S.W.2d 368; Moore v. State, 542 S.W.2d 664; Livingston v. State, 542 S.W.2d 655; Gholson and Ross v. State, 542 S.W.2d 395; Smith v. State, 540 S.W.2d 693. Given the role such

Supreme Court, U. S.
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OCT 22 1979
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * *

NO. 79-5050

* * *

WILLIAM JACK HAMMETT,

Petitioner

V.

STATE OF TEXAS,

Respondent

* * *

On Petition For Writ Of Certiorari
To The Court Of Criminal Appeals
Of The State Of Texas

* * *

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

* * *

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IN THE

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OCTOBER TERM, 1979

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NO. 79-5050

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WILLIAM JACK HAMMETT,

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STATE OF TEXAS,

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* * *

On Petition For Writ Of Certiorari
To The Court Of Criminal Appeals
Of The State Of Texas

* * *

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

* * *

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

OPINIONS BELOW

William Jack Hammett was tried for capital murder in No. 10,509 in the Twenty-third District Court of Brazoria County, Texas. There is no reported opinion of this decision. Appeal was taken to the Texas Court of Criminal Appeals and the case was heard en banc. A majority and dissenting opinion issued but were not published. Copies of these opinions are attached to the Petition for Writ of Certiorari. On Motion for Rehearing the first opinion was withdrawn and a second opinion issued. The second opinion is published at 578 S.W.2d 699 (Tex.Crim.App. - en banc, 1979) reh. denied.

JURISDICTION

The Texas Court of Criminal Appeals entered its last opinion in this case on February 28, 1979. Rehearing was denied on April 11, 1979. The petition for certiorari was filed on July 11, 1979, ninety-two days after the entry of the order denying rehearing and one hundred forty-three days after the entry of the final judgment in this case.

Rule 22 of the Rules of this Court provides:

1. A petition for writ of certiorari to review the judgment of a state court of last resort in a criminal case shall be deemed in time when it is filed with the clerk within ninety days after the entry of such judgment. A justice of this Court, for good cause shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding sixty-days.

There is no indication, by letter or otherwise, that Petitioner ever requested an extension of time.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner claims a right under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States. The case involves application of the Texas Penal Code, §19.03; and Texas Code of Criminal Procedure art. 37.01. Petitioner claims that the case involves art. 3, §31 and §35 of the Constitution of the State of Texas. All these provisions of Texas law are set out in full in the Petition for Writ of Certiorari, pp. 2-5. Finally, the case involves these provisions of the Texas Code of Criminal Procedure:

Art 26.05 Compensation of counsel appointed to defend

Section 1. A counsel appointed to defend a person accused of a felony or a misdemeanor punishable by imprisonment, or to represent an indigent in a habeas corpus hearing, shall be paid from the general fund of the county in which the prosecution was instituted or habeas corpus hearing held, according to the following schedule.

. . .

(d) For expenses incurred for purposes of investigation and expert testimony, a reasonable fee to be set by the court but in no event to exceed $500;

. . .

Art. 46.02. Incompetency to stand trial

. . .

Examination of the Defendant

Sec.3. (a) At any time the issue of the defendant's incompetency to stand trial is raised, the court may, on its own motion or motion by the defendant, his counsel, or the prosecuting attorney, appoint disinterested experts experienced and qualified in mental health or mental retardation to examine the defendant with regard to his competency to stand trial and to testify at any trial or hearing on this issue.

. . .

(g) No statement made by the defendant during the examination or hearing on his competency to stand trial may be admitted in evidence against the defendant on the issue of guilt in any criminal proceeding.

(h) When a defendant wishes to be examined by a psychiatrist or other expert of his own choice, the court on timely request shall provide the examiner with reasonable opportunity to examine the defendant.

. . .

Art. 46.03. Insanity defense

. . .

Examination of the Defendant

Sec.3. (a) If notice of intention to raise the insanity defense is filed under Section 2 of this article, the court may, on its own motion or motion by the defendant, his counsel, or the prosecuting attorney, appoint disinterested experts experienced and qualified in mental health and mental retardation to examine the defendant with regard to the insanity defense and to testify thereto at any trial or hearing on this issue.

. . .

(f) When a defendant wishes to be examined by a psychiatrist or other expert of his own choice, the court on timely request shall provide the examiner with reasonable opportunity to examine the defendant.

. . .

QUESTION PRESENTED

WHETHER PETITIONER WAIVED ANY RIGHT HE MAY HAVE HAD, TO APPOINTMENT OF A PSYCHOLOGIST OR PSYCHIATRIST TO TESTIFY CONCERNING THE PROBABILITY THAT PETITIONER WOULD COMMIT CRIMINAL ACTS OF VIOLENCE, BY FAILING TO SEEK SUCH AN APPOINTMENT UNTIL THE VOIR DIRE OF THE JURY WAS CONCLUDED.

Respondent notes that Petitioner's statement of the Question Presented cites Jurek v. Texas, 428 U.S. 262 (1976). Apparently Petitioner means to urge that Jurek established the "right"

of an indigent to appointment of a psychiatrist. In fact, Jurek established only that the Texas capital murder statute, Texas Code of Criminal procedure, art. 37.01, was constitutional when interpreted so as to allow the Defendant to produce evidence of mitigating circumstances.

STATEMENT OF THE CASE

William Jack Hammett, Petitioner herein and Defendant below, was indicted by a grand jury in Brazoria County, Texas, for capital murder. (Record page 1499; hereinafter R. p. ___.) On April 19, 1977, Petitioner, through his retained counsel, filed a Motion for Commitment to a Mental Hospital for Psychiatrist Testing. (Supplemental Transcript, pp. 23-25; hereinafter Supp.T. p. ___.) When Petitioner made this motion, trial was scheduled to begin in a few days. The court immediately appointed Dr. B. W. Henry, a psychiatrist, to examine Petitioner. (R. p. 1492.) Dr. Henry reported to the court, in a letter dated April 24, 1977, that he had examined Petitioner on April 21, 1977. (R. p. 1489.) The nature of the examination was explained to Petitioner, and he was informed of his right not to participate. (Id.)

> He indicated an agreeableness to participate in the examination. He, further, indicated an awareness of the nature of the charges lodged against him, and [Dr. Henry] advised him of his right not to tend to incriminate himself with regard to those charges outstanding.

(Id.) After approximately forty-five minutes of examination, Mr. Hammett indicated that he did not want to continue. (R. p.1490.) Dr. Henry contacted Petitioner's attorney, who talked with Petitioner, and the interview was terminated. (Id.) Following further consultation with his attorney, Petitioner agreed to the resumption of the interview. In his letter of April 26, 1977, Dr. Henry informs the court of the results of this second interview. (R. p. 1483-88.)

On April 26, 1977, Petitioner's first trial began. In the first phase of the trial, under Texas' bifurcated procedure, Petitioner was found guilty of capital murder; but in the second phase of the trial, the jury could not agree on a punishment. A mistrial was declared. (Supp.T. p. 37.) Dr. Henry testified on May 4, 1979, during the second or punishment phase of this trial.

During the months that followed, Petitioner filed an Affidavit of Poverty and the court appointed three attorneys to represent Petitioner, including Mr. Bob Tarrant, who had been Petitioner's retained counsel at his first trial. (R. pp. 1506, 1507 and 1513.) The last of these attorneys was appointed on August 22, 1977, at least partially as the result of Petitioner's Motion for Continuance, which was granted. (R. p. 1510-13.) A very large number of subpoenas were issued at Petitioner's request. He also filed a large number of motions which were heard prior to the beginning of his second trial. Proceedings in respect to the selection of a jury were begun on October 10, 1977. (R. p. 1.) Voir dire and selection of a jury was completed at approximately ten o'clock on October 14, 1977. (R. pp. 748, 767, 804-805.) After swearing in and instructing the jury, the trial judge asked counsel for Petitioner if there was any further business. (R. pp. 808-809.) After all these proceedings had taken place and had adjourned on October 14, 1977, Petitioner's counsel filed a handwritten motion for appointment of a second psychiatrist. (R. pp. 1631-34.) It was denied. (Id.)

In the ensuing trial, Petitioner was convicted of capital murder in the guilt phase and Dr. Henry testified in the punishment phase. (R. pp. 1239-95.) His testimony was

substantially the same as the testimony he had offered at Petitioner's first trial. (Supplemental record, pages 1-22, consisting of the testimony of the witness Bill W. Henry, M.D., adduced on punishment phase May, 1977, trial; hereinafter Supp. R. p. ____.)

The jury determined that the punishment should be death.

Appeal was taken to the Texas Court of Criminal Appeals, which heard the case en banc. When the case was first argued, The Court of Criminal Appeals of the State of Texas decided that Petitioner was denied a fair trial because the court refused to appoint a psychiatrist of Petitioner's choice to testify for the defense. 578 S.W.2d at 705. On the State's Motion for Rehearing, the Court of Criminal Appeals ordered preparation of a supplemental transcript. (Id. at 706.) On rehearing, the Court of Criminal Appeals reversed itself and affirmed the decision of the jury and the court below. The Court of Criminal Appeals held that, where Petitioner had initially requested the examination by a psychiatrist and had had notice of the content of the psychiatrist's testimony for six months, the trial court did not abuse its discretion in denying Petitioner's motion, made after the completion of the voir dire and selection of a jury and without suggesting any mode of proceeding, for appointment of another psychiatrist of Petitioner's choice. (Id. at 707.) The court also rejected Petitioner's contention that the capital murder provisions of the Texas Penal Code are unconstitutional because of alleged violations of art. 3 of the Texas Constitution during their enactment. (Id. at 713.)

REASONS WHY THE WRIT SHOULD BE DENIED

A. The Petition Is Not Timely

As noted in the jurisdiction section, supra, the Petition was filed two days after the date when the Rules of this court

require it to have been filed. Nothing in the record shows that Petitioner had any excuse or asked for any extension. Therefore the writ should be denied.

B. State Law Provides Adequate Protection Of Petitioner's Rights.

The present case is not an appropriate one in which to consider whether an indigent accused has a federal constitutional right to appointment of a psychiatrist, where the State offers psychiatric testimony on the issue of the likelihood that the accused will commit violent acts in the future, for other reasons as well. The State of Texas affords an accused the means of procuring such testimony whether such a federal constitutional right exists or not. Texas Code of Criminal Procedure, art. 26.05 §1(d), provides that the appointed counsel of an indigent accused may be reimbursed for reasonable expenditures, made procuring expert testimony, of up to $500.00. Counsel for an indigent accused needs no permission from the court to obtain such expert testimony. In addition, arts. 46.02 and 46.03 of the Texas Code of Criminal Procedure provide that, where the competence of the accused is in question or insanity may be raised as a defense, the court may "appoint disinterested experts experienced and qualified in mental health or mental retardation to examine the defendant" with regard to these issues. In the present case, Petitioner failed to avail himself of the provisions of art. 26.05. It should be noted that Petitioner did make a motion under art. 46.02, and the court responded by appointing Dr. Henry. Petitioner did not object to the appointment of Dr. Henry. Petitioner voluntarily allowed himself to be examined by Dr. Henry. Petitioner still had available, even at the time when he made his motion for appointment of a psychiatrist of his choice by the court, the

provisions of art. 26.05. Under these circumstances, it is unnecessary to decide whether any federal constitutional right of an indigent accused to appointment of a psychiatrist of his choice to testify in opposition the proffered testimony of a prosecution-called psychiatrist exists. Any such right is encompassed within and obscured by the state created right to hire an expert witness of his own choosing at state expense.

C. The Petition Does Not Raise Substantial Issues

The case, as decided by the Texas Court of Criminal Appeals, does not make any new law. The holding below is consistent with the rationales of Henry v. Mississippi, 379 U.S. 443 (1965), and Wainwright v. Sykes, 443 U.S. 72 (1977). The by now familiar holding of Sykes is that an accused must follow reasonable rules of orderly procedure when raising federal constitutional issues in his trial. Sykes involved the timing of objections; the present case, the timing of a motion. Petitioner raised the issue on which he petitions for a writ of certiorari in a fashion which was certain to disrupt the orderly administration of justice. Although Petitioner had been aware at least since May of 1977 of the content of Dr. Henry's testimony and that the State would offer the testimony in the punishment phase of his trial, Petitioner waited until the close of the voir dire in his second trial, in October of 1977, to move for appointment of another psychiatrist to testify in rebuttal. Petitioner, in this interim period, requested and received numerous subpoenas. Petitioner raised a number of other issues by motion. All these matters were dealt with by the court before voir dire was concluded. Petitioner, in his motion for appointment of a psychiatrist, failed to mention any particular psychiatrist who was available. Unless Petitioner had a psychiatrist

immediately available, a continuance of the trial would have been necessitated. Since a jury had already been empanelled and sworn in, after four days of intensive voir dire examination, such a continuance would have been a major disruption. Thus, even if one accepts the hypothesis that Petitioner had a federal constitutional right to appointment of a psychiatrist of his own choosing, Petitioner waived that right by raising the issue so late. Significantly, Petitioner offers no excuse for failing to raise the issue in the six months prior to the time when he did raise it. The Texas Court of Criminal Appeals recognized that

> there is a distinction between the appointment of legal counsel to represent an indigent defendant and the appointment of a psychiatrist or psychologist to examine him which stems from the distinct difference in the professions. Nevertheless, a defendant may not manipulate his rights to either to obstruct the orderly administration of justice. [citations omitted.]

578 S.W.2d at 707. There is thus an "adequate and independent" state law ground for the decision below. Henry v. Mississippi, 379 U.S. 443 (1965).

Petitioner raises claims based on the Fifth Amendment. The record is clear, however, that Petitioner was advised of his right to remain silent before Dr. Henry began his examination. In fact, Petitioner exercised this right. Petitioner's sole objection is that Dr. Henry examined him with the primary purpose of determining whether Petitioner was competent. Petitioner objects that he waived his right to remain silent only insofar as the issue of competence is concerned. However, Petitioner has made no showing that examination for the purpose of determining competence is in any way different from an examination for the purpose of determining future dangerousness. Without such a showing, Petitioner's argument is not ripe for decision, since there are no facts in the

record to support the proposed distinction. Moreover, even if such a distinction were proved in the record, Petitioner's argument would have to be rejected. To accept it would be to accept that an accused could waive his right to self-incrimination concerning one crime, but not as to lesser included offenses. It would mean that an accused could agree to make a statement concerning his participation in a criminal act, and if the prosecution later decided that the accused's acts were part of a conspiracy, the accused could object that he had waived his Fifth Amendment right only as to the individual crime and not the conspiracy. The absurdity of this result illuminates the underlying fallacy in Petitioner's contention.

Beginning on page 7 and extending through page 9 of his Petition for Writ of Certiorari, Petitioner states a number of theories which he believes the Court should consider if it grants his petition. The following paragraphs will briefly address each one of these hypotheses.

Petitioner first contends that the doctor's testimony exceeded the authority granted under the court's order, and that this violates the Fourth and Fourteenth Amendments to the Constitution of the United States. This appears to be a contention that the doctor's examination was an unreasonable search in that it extended beyond the authority of the court order. However, the "search" was requested by Petitioner. If, in the course of the requested "search," the doctor discovered things which Petiitoner did not intend to be discovered, that does not make the "search" any less invited.

Petitioner's next argument is that he was denied the right to secure expert opinion testimony by the Court's refusal to grant his motion for appointment of a psychiatrist of his own choosing. This is Petitioner's main argument.

It has been previously dealt with.

There follows a complaint that the State was not required to introduce the court's order for an examination, which showed that the examination was for the purpose of determining competence, and that the State was permitted to imply to the jury that the examination was to all points. This is basically a "best evidence" objection. It does not involve any constitutional right. Moreover, Petitioner himself introduced the order. (R. p. 1271; R. p. 1492.) Petitioner does not indicate any point in the record at which the State implied to the jury that the examination was to all points and not to the question of mental competence. If, indeed. such an implication was made, it was rebutted by Petitioner. (R. pp. 1269-76.)

Petitioner's fourth argument is that the psychiatrist formed his opinions concerning Petitioner's dangerousness at least partially as a result of the doctor's examination of Petitioner's juvenile criminal record and upon "unproven allegations of crimes." It is notable that Petitioner is not objecting that this evidence was actually admitted before the jury at either the guilt or punishment phases of his trial. The matters which Dr. Henry reviewed are stated in the second paragraph of his letter of April 26, 1977. (R. p.1483.) It is not at all clear that the statements to which Petitioner objects were critical in the formulation of Dr. Henry's opinion. Nor is it shown that, if the statements were all false, Dr. Henry's opinion would be different. Moreover, it is clear from the text of Dr. Henry's letters that much of the information in the statements was also related by Petitioner in his voluntary conversations with Dr. Henry. Since the record is not clear this issue is not ripe for decision. If there is any error at all, it is

rendered harmless by Petitioner's voluntary statements of the same facts of Dr. Henry.

Petitioner's fifth contention is that he was denied the opportunity to present testimony of mitigating factors relevent to his punishment when the court denied his motion for appointment of a psychiatrist. However, he has made no offer of proof that any psychiatrist would have testified concerning mitigating factors.

Petitioner's contention that he was denied the right to effective assistance of counsel by the denial of his motion for appointment of a psychiatrist is the same as his second argument. The only difference is in the legal theory upon which the argument is based. As was shown earlier, Petitioner had the opportunity to secure his own psychiatrist without the intervention of the court.

In his last argument under this issue, Petitioner contends that, although he was advised of his right to remain silent, he was not advised that he could remain silent on any question other than his competence. This is the Fifth Amendment argument which was dealt with in the early paragraphs of this section.

Finally, Petitioner contends, at page 18 of his Petition, that he has been denied due process of law because the Texas Court of Criminal Appeals has refused to answer a State law question which was properly presented to them. He contends that the Texas capital murder statute is unconstitutional as a matter of state law because the legislature failed to comply with the provisions of art. 3, §§31 and 35 of the Texas Constitution. The answer to this contention is that the Texas Court of Criminal Appeals did address this question. 578 S.W.2d at 713. In an extremely convoluted argument, Petitioner contends that the court below did not in fact

deal with all these contentions. However, the fact that Petitioner finds the curt disposition of his argument unsatisfactory does not show that the Texas Court of Criminal Appeals failed to deal with it. The state law issues which Petitioner wishes to address concern the ability of one body of the state's bicameral legislature to "amend" a bill pending before the other by enactment of its own bill; and whether the caption of the capital murder act sufficiently informed legislators of its content. There is no federal constitutional interest sufficient to warrant this Court's interference in the affairs of the legislature of the State of Texas with respect to these issues. The Texas Courts have concluded that Petitioner's contentions have no merit.

CONCLUSION

The petition for writ of certiorari is not timely. This case involves an application of the principles of the prior law of Wainwright v. Sykes, 443 U.S. 72 (1977). Because the State of Texas affords an accused wide opportunity to obtain psychiatrist testimony when needed, this is not an appropriate case in which to consider whether indigents have a federal constitutional right to appointment of a psychiatrist in some cases. Nor does this case raise any issue with respect to the Fifth Amendment. Petitioner was advised of his right to remain silent before his psychiatric examination. The various theories which Petitioner advances in support of his petition are wanting. Some of them lack support in the record, and are thus not ripe for decision. Most of them lack any support in legal authority. At least one of them is beyond the jurisdiction of this Court because it involves purely state law questions.

WHEREFORE, PREMISES CONSIDERED, Respondent, the State of Texas respectfully prays that this honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

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evidence has come to play, the unique character of the issue, the extreme consequences that rest on resolution of the issue, and the tremendous diversity of opinions on such matters within the field of experts that may qualify to give such evidence on the issue, it cannot be denied that for accused persons facing the possibility of death, expert behavioral witnesses for the defense are necessities, not luxuries.

If the scales of justice are to weigh equal regardless of wealth; if the hand of justice is to extend as far to those who cannot afford to hire an expert as to those who can; if the State is not to have exclusive access to experts; if the jury is to hear "all possible relevant information about the individual defendant whose fate it must determine," Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), and not hear only those experts of the prosecutorial persuasion; if fairness and open inquiry are to characterize the judicial exploration of the accused's mental condition and possible future conduct: then the indigent capital murder defendant must have equal access to psychological or psychiatric expert opinion testimony from some expert of his reasonable choosing, but not necessarily his first choice.

I concur.

ODOM, Judge

(Delivered February 28, 1979)

En Banc

Judges Roberts and Phillips join in this concurrence